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In The Supreme Court of the United States

LORETTA K. KELLY, WARDEN,

Petitioner,

v.

LEON JERMAIN WINSTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. In reversing the district court's denial of habeas corpus relief to a state prisoner, did the Fourth Circuit deny the state court judgment the deference mandated by 28 U.S.C. § 2254 by holding that the state court's judgment was not an adjudication on the merits and thus entitled to no deference because the state court dismissed the claim without an evidentiary hearing, by confusing the application of §§ 2254(d) and (e)(1), by approving a hearing in federal court contrary to AEDPA, and by accepting, without finding cause and prejudice for the default, new evidence to support a claim of mental retardation which the state prisoner affirmatively had told the state court had been destroyed?

2. In granting habeas corpus relief to a state prisoner, did the Fourth Circuit impermissibly enlarge the Sixth Amendment right to effective assistance of counsel, in conflict with *Strickland v. Washington*, by permitting consideration of evidence which did not exist at the time of counsel's representation?

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OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment of the United States District Court, is reported as *Winston v. Kelly*, 592 F.3d 535 (4th Cir. 2010). The order of the Fourth Circuit denying the Warden's petition for rehearing and for rehearing *en banc* is unpublished. The opinion of the District Court denying the habeas corpus petition is reported as *Winston v. Kelly*, 600 F.Supp.2d 717 (W.D. Va. 2009). The order of the Supreme Court of Virginia dismissing the habeas corpus petition is unpublished. Each of these decisions is reproduced in the Appendix to this petition.

The opinion of the district court granting an evidentiary hearing in the habeas corpus case is reported as *Winston v. Kelly*, 624 F.Supp.2d 478 (W.D. Va. 2008). The opinion of the Supreme Court of Virginia affirming on direct appeal is reported as *Winston v. Commonwealth*, 604 S.E.2d 21 (Va. 2004).

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on January 27, 2010, reversing the district court's denial of habeas corpus relief. It denied the Warden's timely petition for rehearing and for rehearing *en banc* on February 23, 2010. The jurisdiction of this Court is timely invoked under 28 U.S.C. §§ 1254(1) and 2101, and by Rule 13(3) of the Rules of this Court. On

March 9, 2010, the Fourth Circuit granted the Warden's motion to stay its mandate pending disposition of this petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

2. Section 2254 of Title 28 of the United States Code provides the standard for a federal court's collateral review of a state court criminal judgment. Subsections (a) through (e) are reproduced in the Appendix to this petition. (App. 176a).

3. Virginia Code § 19.2-264.3:1.1 provides the Virginia General Assembly's definition of mental retardation and procedures by which a person charged with capital murder or sentenced to death may prove a claim of mental retardation. The statute in existence at the time Leon Winston was sentenced is reproduced, in pertinent part, in the Appendix to this petition. (App. 173a).

STATEMENT OF THE CASE

Summary

A jury convicted Leon Winston of the capital murders of Anthony Robinson and his wife, Rhonda. Prior to trial, Winston's two defense counsel obtained all of Winston's school, medical, and other background records. They obtained the appointment of Dr. Evan Nelson, who evaluated Winston for mental retardation.[1] Dr. Nelson concluded that Winston could not prove he was retarded under Virginia's post-*Atkins* statute because Winston's IQ scores all were above the statutory cut-off of 70, and because no sources, including Winston himself, described deficits in adaptive functioning.[2] He also concluded that Winston had an antisocial personality and elements of a psychopath, and that the defense should not use him as an expert. Defense counsel did not present Dr. Nelson or a claim of retardation.

In later state habeas corpus proceedings, Winston's new lawyers argued that trial counsel rendered ineffective assistance of counsel because they decided not to claim that Winston met Virginia's statutory

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[1] Dr. Nelson was the same forensic psychologist who determined that Daryl Atkins was retarded in the case of *Atkins v. Virginia*, 536 U.S. 304, 308 (2002).

[2] The Virginia Supreme Court interprets Virginia Code § 19.2-264.3:1.1's significant sub average intellectual functioning element as requiring an IQ score under 70. *Johnson v. Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *vacated on other grounds*, 544 U.S. 901 (2005).

definition of mental retardation. The state habeas court found the claim lacked merit under *Strickland v. Washington*, 466 U.S. 668 (1984). Winston's habeas attorneys presented the claim, with new facts, to the federal district court which conducted a full evidentiary hearing. It found the new facts procedurally defaulted and the state habeas court's decision not unreasonable under 28 U.S.C. § 2254(d).

A panel of the Fourth Circuit, Judges Michael, Gregory, and Duncan presiding, in an opinion authored by Judge Michael, reversed the district court's decision. The Fourth Circuit held that the Virginia habeas court's decision was due no deference under § 2254(d) and remanded for another decision on the claim, although this time as a *de novo* matter and to include Winston's new evidence.

The Crimes

Anthony Robinson was shot eight times and killed in his home on April 19, 2002. His wife, Rhonda, who was pregnant, also was shot eight times and killed in the home. Rhonda's eight-year-old daughter, Niesha, witnessed two black men, one with a "big dog" tattoo, enter the house and take Anthony downstairs, while the other intruder stayed upstairs with Niesha, Rhonda, and Niesha's five-year-old sister, Tiesha. Niesha heard gunshots downstairs and watched as the shooter with the tattoo came back upstairs and shot and killed her mother in the

presence of the two children. *Winston*, 604 S.E.2d at 27.

In addition to Niesha's testimony, the evidence showed that Winston had a "big dog" tattoo and Winston admitted he was present during the murders. *Id.* A cab driver and two women who had driven the killers to and from the Robinsons' house that morning testified. *Id.* A friend of Winston's testified that Winston confessed he had killed the Robinsons and stolen their money and drugs. *Id.*, 604 S.E.2d at 27-28. Forensic testing identified a gun belonging to Winston as the murder weapon. DNA testing of the gun matched Winston to it with a one in six billion chance of it being someone else. *Id.*, 604 S.E.2d at 28. Before trial, and in the presence of his trial counsel, Winston made a lengthy proffer of incriminating facts to the prosecutor in hopes of producing a plea agreement. The proffer was not used at trial, but came into evidence during Winston's state and federal habeas cases in connection with his frivolous claims of innocence. (CA4 JA 479-567).[3]

The Trial

In June of 2003, a jury in the Circuit Court for the City of Lynchburg, Virginia found Winston guilty of capital murder of Anthony Robinson in the commission of attempted robbery, capital murder of Rhonda Robinson in the commission of attempted

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[3] References to the joint appendix filed below in the Fourth Circuit are denoted herein as "(CA4 JA ___)."

robbery, capital murder of Rhonda Robinson during the same transaction in which Winston willfully, deliberately and with premeditation killed another, attempted robbery (2 counts), statutory burglary, maliciously discharging a firearm, and use of a firearm in the commission of a felony (5 counts).

At sentencing, the prosecution presented evidence of Winston's prior criminal record of violence. Defense counsel presented the jury with a vast array of background information about Winston: an employee of the jail to say he behaved well; his mother, grandmother, and great-grandmother to describe his impoverished and neglectful upbringing; and four written evaluations of Winston as a child which demonstrated, and corroborated, the parental neglect. (App. 50a-55a); *Winston*, 624 F.Supp.2d at 512. The jury sentenced Winston to three death sentences for the capital murder convictions, finding both the future dangerousness and vileness aggravating circumstances.

State Post-Trial Proceedings

The Supreme Court of Virginia unanimously affirmed Winston's convictions and sentences on November 5, 2004. *Winston*, 604 S.E.2d at 54. The court specifically found that Winston "deliberately declined to raise a claim of mental retardation under the statutory provisions that apply to him and his trial." *Id.* at 51. On October 3, 2005, this Court denied

certiorari review. *Winston v. Virginia*, 546 U.S. 850 (2005).

With new counsel, Winston claimed on state habeas corpus review in the Virginia Supreme Court that he was mentally retarded based on the record as it existed when his trial counsel had him evaluated by Dr. Nelson. (App. 163a-164a). Winston also claimed that his trial counsel acted ineffectively under *Strickland* when they declined at trial and on appeal to claim that he was retarded. (App. 164a). Winston presented to the state habeas court documents which had been reviewed by Dr. Nelson, including three IQ test scores of 77, 73, and 76, obtained when Winston was seven, ten, and fifteen years of age. (App. 164a). He argued that the scores should be "adjusted" downward by use of a theory called the "Flynn effect" and a standard error of measurement (SEM). (App. 96a-97a). He presented his high school's special education classification of "mentally retarded," but no IQ score supporting the classification. (*Id.*). Winston's state habeas exhibits showed that the school could classify students as mentally retarded, and thus eligible for special education services, even if they achieved IQ scores above 70. (App. 164a). His exhibits also showed that the school had destroyed any supporting records regarding its classification of retardation, including IQ scores, testing data, and the like. (App. 95a).

The Virginia Supreme Court found the claim of retardation barred under its rule in *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), because Winston could have raised the claim at trial and on appeal,

but deliberately chose not to. (App. 163a-164a). It dismissed his claim of ineffective assistance because the claim presented no evidence that counsel could have used to demonstrate that Winston was mentally retarded under Virginia law. (App. 164a-165a). It explained that a capital murderer must have a qualifying IQ score lower than 70, Winston's scores all were higher than 70, and the school could have classified him "mentally retarded" despite his above-70 IQ scores. (*Id.*). The state court noted, but implicitly rejected, Winston's score-lowering theories. (*Id.*). The Virginia Supreme Court thus found no ineffective assistance under both prongs of the *Strickland* analysis. (App. 164a).

On June 27, 2007, the Circuit Court for the City of Lynchburg ordered that Winston be executed on August 1, 2007, as mandated by Virginia Code § 53.1-232.1.

Federal Habeas Corpus Proceedings

On July 30, 2007, the United States District Court for the Western District of Virginia stayed the execution, and Winston filed a habeas corpus petition under 28 U.S.C. § 2254. On May 30, 2008, the district court ordered an evidentiary hearing on Winston's *Atkins*-related claims over the Warden's objections. *Winston*, 624 F.Supp.2d at 517. The district court believed it had discretion to hold a hearing under *Schriro v. Landrigan*, 550 U.S. 465 (2007). (App. 108a).

Two weeks before the hearing, and for the first time ever, Winston's habeas counsel talked to the psychologist who had tested him in conjunction with the high school's classification. (App. 11a). These were the same habeas attorneys who had told the state court that the records had been destroyed. The psychologist did not remember Winston or her testing (CA4 JA 792), but she found in her attic a floppy disk with a report on it that said Winston had obtained an IQ score of 66. (App. 100a-101a; CA4 JA 822). She was not part of the eligibility committee meeting that determined Winston's classification. (CA4 JA 809). She had no supporting documents such as the IQ test, her scoring, or notes. (CA4 JA 791, 820). She did not know if the report on the disk was used by the school or was a final report, but assumed so. (App. 100a; CA4 JA 818).

At the hearing, the evidence demonstrated that Dr. Nelson advised trial counsel that Winston "ran a drug business, managed his own finances, bought his own clothes, found places to live, knew how to drive and generally navigate" and thus did not demonstrate adaptive deficits. (App. 94a). Dr. Nelson told trial counsel that Winston had an antisocial personality and some elements of psychopathy. (CA4 JA 2115, 2117, 2127). Dr. Nelson "strongly advised defense counsel not to call [him] for sentencing" because there would be a high risk he would add to aggravation. (CA4 JA 2117). Counsel viewed Dr. Nelson's potential testimony as "a minefield." (CA4 JA 2127).

After hearing two days of conflicting evidence from experts, the district court found: Winston's newly-presented IQ score of 66 was a fact that should have been presented to the state court first; Winston's habeas counsel's "perceived futility" excuse for not attempting to discover it was not legally justifiable; and the new evidence thus was procedurally barred from review. (App. 116a, 131a). It held that the ineffective assistance claim must be decided by application of the deference standard in § 2254(d), and upon the record which was before the state court at the time of decision. (App. 122a-131a).[4] It found that the state court had rejected the "Flynn effect" theory of score-reduction.[5] (App. 128a-129a). Finding the

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[4] However, the district court did consider the new IQ score in connection with its determination of whether Winston had shown actual innocence under *Sawyer v. Whitley*, 505 U.S. 333 (1992), as a gateway to consideration of the defaulted facts. (App. 119a-122a). The court found that, "Winston cannot show that no reasonable juror would have found him eligible for the death penalty" because the record was so conflicting on the issue of retardation. (App. 122a)

[5] Virginia Code § 19.2-264.3:1.1 does not mention the "Flynn effect," the SEM, or any other theory by which an individual's earned IQ score may be lowered. At the district court hearing, the Warden's expert explained that the "Flynn effect" was not scientifically recognized or professionally sanctioned. (App. 104a); *see Green v. Johnson*, 515 F.3d 290, 300 (4th Cir.) (Virginia statute does not include these score-adjustments), *cert. denied*, 128 S. Ct. 2527 (2008); *Walton v. Johnson*, 440 F.3d 160, 178 (4th Cir.) (too speculative to reduce, rather than increase, an IQ score for the SEM), *cert. denied*, 547 U.S. 1189 (2006). Winston's expert admitted the "Flynn effect" was controversial

(Continued on following page)

Virginia Supreme Court's decision not unreasonable, the district court denied relief on March 6, 2009.

On January 27, 2010, the Fourth Circuit reversed the district court's judgment, finding that it was error not to consider the newly-presented 66 IQ score. (App. 46a). The Fourth Circuit concluded that when a state court denies an evidentiary hearing, then "comity and federalism do not require deference when material evidence later surfaces in a federal habeas hearing." (App. 37a).[6] It held that when a state court denies a hearing, the State forfeits the exhaustion/procedural default doctrine. It held that § 2254(d) applies only in cases where a federal evidentiary hearing develops no new facts, or where the new facts fundamentally alter the claim. (App. 27a). It found that Winston's new 66 IQ score did not fundamentally alter the claim he had presented to the state habeas court. (App. 27a-32a). It ordered the district court to: re-determine Winston's ineffective

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and that there was no consensus on its use to lower an individual's earned IQ score. (App. 102a).

[6] The Fourth Circuit implied that no deference was due to the Virginia Supreme Court's habeas decision because that court denied Winston's discovery motion. (App. 25a). However, the record shows that Winston did not seek discovery from the state court with respect to any *Atkins*-related claim. (State Habeas Motion for Discovery filed March 24, 2006, in the Virginia Supreme Court shows discovery sought only on *Brady* claims). Indeed, Winston admitted to the district court that he had not sought help from the state habeas court to find any IQ records because he believed such a motion would have been futile. (App. 116a).

assistance claim *de novo*, without deference to the state court decision (App. 46a: "we hold that § 2254(d) does not apply . . . and that the district court should not afford deference to the Supreme Court of Virginia's application of *Strickland*."); and make its own determination of whether the "Flynn effect" should apply in deciding that claim. (App. 48a-49a).

REASONS FOR GRANTING THE WRIT

Introduction

Three years ago, the Court of Appeals for the First Circuit observed that "a comprehensive interpretation of AEDPA's factual review scheme has yet to emerge from the federal courts." *Teti v. Bender*, 507 F.3d 50, 58 (1st Cir. 2007) (referencing AEDPA, the Antiterrorism and Effective Death Penalty Act of 1996), *cert. denied*, 552 U.S. 1287 (2008). This was an understatement: the state of the law and practice in the lower federal courts, with respect to implementation of the "factual review scheme" in federal habeas corpus cases, is in considerable disorder. Given that the Antiterrorism and Effective Death Penalty Act was enacted *fourteen years ago*, the time is *long* overdue for this Court comprehensively to resolve this clear and persistent schism among the circuits.

The issues in conflict are well known: whether and how § 2254(e)(1)'s presumption of correctness fits with § 2254(d)(2)'s deference to facts, *see Wood v.*

Allen, 130 S. Ct. 841, 848 (2010) (describing but declining to address conflict); whether § 2254(d)'s deference standard applies to new facts permitted to be developed in federal court, *see Holland v. Jackson*, 542 U.S. 649, 653 (2004) (describing but declining to address conflict); *see also Bell v. Kelly*, 129 S. Ct. 393 (2008) (dismissing writ as improvidently granted on the conflict); and whether § 2254(d) deference applies at all if the state court did not hold an evidentiary hearing or did not provide a "full and fair" review. *See Teti*, 507 F.3d at 58 (describing cases in conflict).

To be sure, there are ancillary factual review matters at issue in the courts below: whether a federal habeas court can hold an evidentiary hearing (and develop new facts) as a threshold matter before deciding whether the state court decision was unreasonable under § 2254(d), *see Valdez v. Cockrell*, 274 F.3d 941, 952 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002); whether a federal habeas court's assessment of the prisoner's presentation of new facts is governed by a determination of whether and how they alter the state court claim, or instead is governed by the twin principles of the exhaustion and procedural default doctrines, *compare Morris v. Dretke*, 413 F.3d 484, 494 n. 7 (5th Cir. 2005) (discussing "fundamentally alters" cases) *to Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) (requiring showing of "cause and prejudice" as gateway to development of new facts in federal habeas review); and whether a state court's summary rejection of a claim without an evidentiary hearing removes application

of § 2254(d)'s deference standard altogether, *see Harrington v. Richter*, 176 L. Ed. 2d 108 (2010) (certiorari granted to decide, among other things, whether a state court's summary dismissal is owed deference under § 2254(d)); *Smith v. Spisak*, 130 S. Ct. 676, 688 (2010) (describing issue but declining to decide it).

Rarely, if ever, has a case come to this Court that would permit resolution of all these issues. This case, however, presents this Court with just such an opportunity.

In addition, the Fourth Circuit's judgment orders the district court to re-determine, as a *de novo* matter, Walker's claim of ineffective assistance of counsel by taking into consideration both his new evidence of a 66 IQ score and his "Flynn effect" theory to reduce his old IQ scores. However, it is uncontested that all school records to support his high school special education classification had been destroyed (and remain so to this day), and thus were not available to either trial counsel or habeas counsel. It is uncontested that his own expert at the federal district court evidentiary hearing agreed that the "Flynn effect" theory of reducing individuals' earned IQ scores was controversial and without scientific consensus. And it is unchallengeable that the "Flynn effect" theory of adjusting an individual's IQ score did not even exist at the time of Winston's trial.

The Fourth Circuit's judgment thus is irreconcilable with, not only the mandate of § 2254(d), but also with the settled standard of *Strickland*, 466 U.S.

at 689, which commands that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689.

I. The Fourth Circuit's judgment conflicts with the decisions of this Court, and the lower courts continue to be in conflict, regarding the application of AEDPA both to claims which a state court decided, and to new facts which the state prisoner presents for the first time to the federal court.

A. AEDPA mandates that federal habeas corpus courts must determine, as a threshold matter, whether a state court's merits adjudication was constitutionally unreasonable.

This Court held long ago that federal habeas rules respecting federalism and finality possess:

> the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of § 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later

> will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings.

Wainwright v. Sykes, 433 U.S. 72, 90 (1977). Nineteen years later, Congress overhauled § 2254, making mandatory a prohibition that a federal habeas petition filed by a state prisoner "shall not be granted" unless the decision of the state court was constitutionally *unreasonable*. 28 U.S.C. § 2254(d). Congress mandated that the granting of relief would be the exception, not the rule. Its intent in enacting the Antiterrorism and Effective Death Penalty Act in 1996 could not have been more plain:

> Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, see *Williams* v. *Taylor*, 529 U.S. 362, 386 (2000) (opinion of STEVENS, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law"); see also *id.*, at 404 (majority opinion), and "to further the principles of comity, finality, and federalism," *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). One of the methods Congress used to advance these objectives was the adoption of an amended 28 U.S.C. § 2254(d). *Williams*, 529 U.S., at 404 ("It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved"). As we have explained before, § 2254(d) places "new

> constraints on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Id.*, at 412. Our cases make clear that AEDPA in general and § 2254(d) in particular focus in large measure on revising the standards used for evaluating the merits of a habeas application.

Woodford v. Garceau, 538 U.S. 202, 206 (2003).

Section 2254(d) is not a discretionary matter. It does not provide that the federal courts may apply its standard of deference *unless*, as the Fourth Circuit held in this case, the state prisoner comes up with new evidence in federal court that is compelling or dispositive, much less "material."

Now, fourteen years after Congress revamped the statute, the lower federal courts still are ignoring, or interpreting away, the mandatory standard. As recently as May 3, 2010, this Court had to reverse yet another federal habeas decision which had ignored § 2254(d)'s command:

> It is important at the outset to define the question before us. That question is not whether the trial judge should have declared a mistrial. It is not even whether it was an abuse of discretion for her to have done so – the applicable standard on direct review. The question under AEDPA is instead whether the determination of the [state court] that there was no abuse of discretion was "an

> unreasonable application of . . . clearly established Federal law." § 2254(d)(1).
>
> * * *
>
> AEDPA prevents defendants – and federal courts – from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts. Whether or not the [state court's] opinion reinstating Lett's conviction in this case was *correct*, it was clearly *not unreasonable*.

Renico v. Lett, 559 U.S. ___ (2010) (emphases in original) (slip op. at 5, 12) (reversing Sixth Circuit's judgment that disagreed with the state court conclusion on merits of claim of error in granting mistrial and retrial); *see also Thaler v. Haynes*, 130 S. Ct. 1171, 1173 (2010) (reversing Fifth Circuit's judgment that state court decision on *Batson* claim was entitled to no deference); *McDaniel v. Brown*, 130 S. Ct. 665, 672 (2010) (*per curiam*) (Ninth Circuit made "egregious error" in concluding state court decision was unreasonable); *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (reversing Ninth Circuit's grant of habeas relief because a state court's decision on a claim of ineffective assistance of counsel must receive "doubly deferential judicial review"); *Waddington v. Sarausad*, 129 S. Ct. 823, 831 (2009) (reversing Ninth Circuit and holding that a federal court under the AEDPA must find state court decision both erroneous and objectively unreasonable before granting relief).

That the deference standard, with its inquiry into the reasonableness of the state court decision, is a

threshold matter, cannot be questioned. Congress placed the deference language at the threshold of the statute. (App. 177a). This Court has described it so: "our cases have [used the 'deference' description] . . . over and over again to describe the effect of the *threshold restrictions* in 28 U.S.C. § 2254(d). . . ." *Lett* (slip op. at 6 n. 1) (emphasis added).

To interpret § 2254(d) as making the reasonableness inquiry some sort of *last* step, only after a re-do in the federal court of the merits of the claim, would defeat the entire purpose of avoiding delays and retrials, and of furthering the interests of comity, finality and federalism. The Fourth Circuit's decision in Winston's case, jettisoning entirely the state court decision without even attempting to make the reasonableness inquiry mandated by § 2254(d), is in direct conflict with the statute and this Court's oft-repeated command that the lower courts must first undertake § 2254(d)'s direction.

Just as in *Lett*, the Virginia "Supreme Court's adjudication involved a straightforward application of our longstanding precedents to the facts of [Winston's] case." *Lett*, slip op. at 9. The Virginia Supreme Court cited this Court's precedent of *Strickland* as governing Winston's claim of ineffective assistance of counsel. (App. 164a). It then applied the two-part test to the facts of Winston's case. It found that all his IQ scores were above the statutory 70 cut-off line, his own exhibits showed that the records to support his special education classification were unavailable, and his own exhibits showed that the classification could

have been supported by a score above 70. Winston had no evidence he was diagnosed as retarded under the statutory definition, and thus failed to demonstrate either deficient performance or actual prejudice under *Strickland*. (App. 163a-165a).

That decision was due "dual layers of deference" by § 2254(d). *Lett*, slip op. at 11, *citing Mirzayance*, 129 U.S. at 1420 (*Strickland* claim due "doubly deferential judicial review" in federal court). The Fourth Circuit's failure to accord the proper deference, and especially its bizarre ruling that the state court decision was due *no deference*, must be addressed lest it become the standard in the Fourth Circuit, adding to the other circuits which have chosen to disregard AEDPA. The Court should grant certiorari to clarify for the lower courts that they are not authorized to disagree with a reasonable state court judgment.

B. A federal habeas corpus court may not set aside the deference standard based upon state court procedures such as summary dismissal or denials of evidentiary hearings.

The Fourth Circuit held that the Virginia Supreme Court's decision – that Winston's trial counsel had not been ineffective under *Strickland v. Washington* – was not "adjudicated on the merits" under § 2254(d), and thus was entitled to no deference, because the state court denied Winston's request for an evidentiary hearing. That holding conflicts with

§ 2254(d), and with this Court and other courts of appeals.

It cannot be denied that summary disposition of state prisoners' applications is the norm in state court post conviction review proceedings. *See* Brief Of *Amici Curiae* State Of Idaho And 30 Other States In Support Of Respondent, *Bell v. Kelly*, 2007 U.S. Briefs 1223 (2008). It also cannot be denied that every circuit except the Ninth, *see Brazzel v. Washington*, 491 F.3d 976, 981 (9th Cir. 2007), and now the Fourth, requires § 2254(d) deference to summary state court decisions. *See* Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1262 (6th ed. 2009); *Wright v. Secretary for Department of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002); *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (*per curiam*); *Sellan v. Kuhlman*, 261 F.3d 303, 311-12 (2d Cir. 2001); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997); *Rashad v. Walsh*, 300 F.3d 27, 45 (1st Cir. 2002); *Chadwick v. Janecka*, 312 F.3d 597, 606 (3d Cir. 2002); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Irick v. Bell*, 565 F.3d 313, 320 (6th Cir. 2009); *Brown v. Luebbers*, 371 F.3d 458, 462 (8th Cir. 2004) (*en banc*).

Before 1996, the federal habeas statute permitted a federal habeas court to re-decide a state prisoner's claim if the state court did not hold a hearing or if its procedures were not "full and fair." *Valdez*, 274 F.3d at 949-50 (comparing § 2254(d) under prior law providing for a presumption of

correctness with various exceptions, to the new § 2254 with no exceptions to deference standard). The Anti-terrorism and Effective Death Penalty Act jettisoned those exceptions to the deference requirement. *Id. See Chadwick*, 312 F.3d at 606 (then-Judge Samuel Alito finding that, under *Weeks v. Angelone*, 528 U.S. 225, 231-37 (2000), summary dismissals are due deference under § 2254(d)).

Indeed, in reversing the court of appeals for failure to apply the presumption of correctness appearing in the pre-1996 § 2254(d), this Court observed that:

> Section 2254(d) applies to cases in which a state court of competent jurisdiction has made "a determination after a hearing on the merits of a factual issue." It makes no distinction between the factual determinations of a state trial court and those of a state appellate court. Nor does it specify any procedural requirements that must be satisfied for there to be a "hearing on the merits of a factual issue," other than that the habeas applicant and the State or its agent be parties to the state proceeding and that the state-court determination be evidenced by "a written finding, written opinion, or other reliable and adequate written indicia."

Sumner v. Mata, 449 U.S. 539, 546 (1981). Given that the current § 2254(d) and (e) did away altogether with any mention of "a hearing on the merits" in state court, indeed, does not even mention *any procedure* whatsoever in state court, it is not surprising that the

great weight of authority is against the Fourth Circuit's decision in Winston's case.

A grant of certiorari in this case to decide the issue of whether a state court's summary dismissal on the merits is owed the deference mandated by § 2254(d) would complement and round out the Court's grant of certiorari in *Harrington v. Richter*, 130 S. Ct. 1506 (2010), that will decide whether a state court's summary reasoning on the merits is owed deference.

C. Section 2254(d)(2)'s reasonableness requirement and § 2254(e)(1)'s presumption of correctness are part of the same deference to state court judgments that Congress mandated.

This Court, in *Wood*, 130 S. Ct. at 845, held that it would not decide the issue upon which certiorari had been granted: the relationship between the fact-review-standards in § 2254(d)(2) and § 2254(e)(1). It appears that the Fourth Circuit was holding its decision in Winston's case for this Court's decision in *Wood* because, seven days after *Wood* was decided, the Fourth Circuit explicitly noted that this Court did not decide it, and then it proceeded to resolve it in Winston's case. (App. 40a).

The Fourth Circuit held that § 2254(d) would not apply to Winston's case because Winston had presented new evidence in the federal court. It then paradoxically held that § 2254(e)(1)'s presumption of

correctness *would* apply to any facts found by the state court, while at the same time, ordering the district court to re-decide the claim of ineffective assistance of counsel based on a *new fact never presented to the state court*: Winston's new evidence of a 66 IQ score that he had told the state court did not exist. This holding presents the Court with an opportunity to decide the issue left open in *Wood v. Allen*.

The courts of appeal clearly are at odds on the issue of when and how § 2254(e)(1) and § 2254(d)(2) should apply. *See, e.g.*, *Wood v. Allen*, 542 F.3d 1281, 1285, 1304, n. 23 (11th Cir. 2008); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir.) (where a habeas petitioner challenges state-court factual findings "based entirely on the state record," the federal court reviews those findings for reasonableness only under § 2254(d)(2), but where a petitioner challenges such findings based in part on evidence that is extrinsic to the state-court record, § 2254(e)(1) applies), *cert. denied*, 543 U.S. 1038 (2004); *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004) ("§ 2254(d)(2)'s reasonableness determination turns on a consideration of the totality of the 'evidence presented in the state-court proceeding,' while § 2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record"); *Trussell v. Bowersox*, 447 F.3d 588, 591 (8th Cir.) (federal habeas relief is available only "if the state court made 'an unreasonable determination of the facts in light of the evidence presented in the State

court proceeding,' 28 U.S.C. § 2254(d)(2), which requires clear and convincing evidence that the state court's presumptively correct factual finding lacks evidentiary support"), *cert. denied*, 549 U.S. 1034 (2006); *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008) (§ 2254(d)(2) can be satisfied by showing, under § 2254(e)(1), that a state-court decision "rests upon a determination of fact that lies against the clear weight of the evidence" because such a decision "is, by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable" (internal quotation marks omitted)).

This Court must be sensitive to the predicament presented by these issues. The Antiterrorism and Effective Death Penalty Act mandates deference to state court decisions and fact-finding. *Renico*, slip op. at 5. It prohibits evidentiary hearings in federal court absent the most extraordinary circumstances, *e.g.*, where the prisoner has been diligent but the state has thwarted his ability to develop the facts. *See Williams v. Taylor*, 529 U.S. 420 (2000) (withholding evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), about which the prisoner could not have known or presented to the state court). However, the lower federal courts, as the Fourth Circuit has done in Winston's case, have reinterpreted the Act in such a way as to liberally permit the federal courts to authorize new fact-finding, and then to reason backwards to conclude that the state court's decision was not deserving of either deference or a presumption of

correctness. The Act simply does not authorize this "cart before the horse" method of review.

For example, it is illogical to say that the *Sumner* holding, and present-day § 2254(e)(1)'s presumption of correctness (deference to the facts), would apply to a state court's finding of a fact, but that § 2254(d)'s deference to the decision would not. Yet that is exactly what the Fourth Circuit held in Winston's case.

Moreover, it does no good, and is harmful to the States' considerable interest in the principles of federalism and finality which are codified in the AEDPA, for the federal courts to continue to parse the mandated deference into two separate categories – one for the state court record and one for the federal court (real) record. To do so is to nullify AEDPA's clear intent that the trial is the main event, the state court is the main decider, and the federal court is available only as a last resort for relief from extraordinarily rare, *unreasonable* decisions by the state court, made against all presumptions to the contrary.

The lower federal courts' persistence in disobeying AEDPA and this Court's precedents should not be avoided by the familiar judicial device of finding "no merit in any event," or "no harm, no foul" method of upholding a correct state court judgment in order to avoid deciding lower court conflicts. *See Mirzayance*, 129 S. Ct. at 1419 n. 2. Each time a federal court ignores, or disagrees with, a state court's reasonable judgment, and each time it permits new

fact-development without meeting the stringent exceptions in § 2254(e)(2), it does great harm and offense to the principles of comity, federalism and finality of state court criminal judgments.

Winston's case presents the opportunity to decide the issue of when and how § 2254(e)(1) and § 2254(d)(2) will apply to an issue decided by the state court and then presented to the federal court with a new set of facts.

D. New facts presented to a federal habeas corpus court may not be considered unless the state prisoner proves cause and prejudice for his failure to present them to the state court.

The Antiterrorism and Effective Death Penalty Act simply does not address the procedural default doctrine. Congress had no need to address it because it was, and remains, a robust doctrine based on settled precedents from this Court. *See, e.g., House v. Bell*, 547 U.S. 518, 522 (2006). The familiar doctrine generally forecloses federal court review of any state prisoner's claim that was either procedurally defaulted in state court, *see Coleman v. Thompson*, 501 U.S. 722 (1991), or unexhausted and would be barred upon reapplication to the state court. *See Gray v. Netherland*, 518 U.S. 152 (1996). It permits review only upon a showing of "cause" to excuse the default and prejudice flowing therefrom, *Coleman*, 501 U.S. at 747, or a showing of actual innocence. *House*, 547 U.S. at 522.

In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), this Court held that facts, as well as claims, come under the procedural default doctrine. Presentation of a fact to the federal court that was not presented to the state court will be barred from federal habeas review absent a showing of "cause and prejudice" or "actual innocence." 504 U.S. at 8-9 ("cause and prejudice" accommodates concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum).

When Winston expressly told the state habeas court that the documents supporting his claim of ineffective assistance had been destroyed by the school, and then, in federal court, presented the federal judge with a document he previously said had been destroyed, he forfeited review of his new facts, exactly as the district court held. The district court's analysis precisely followed this Court's precedents: it found, after a full evidentiary hearing, that Winston did not diligently attempt to develop his facts in state court. (App. 105a-106a, 112a-118a).[7] It thus properly found

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[7] The Fourth Circuit's opinion inexplicably misstates Virginia law in its conclusion that Winston could not have requested from the state court a subpoena to obtain any existing school records in the possession of third parties in the absence of an evidentiary hearing. (App. 32a). The Fourth Circuit cited a Virginia statute and a decision of the Virginia Supreme Court (App. 32a), but neither authority in any manner supports that gross misstatement of state law. Discovery in a Virginia habeas corpus case most certainly is *not* limited to instances wherein an evidentiary hearing has been ordered, and no authority so holds. The Virginia Supreme Court Rules, Part 4, govern discovery in habeas corpus proceedings, and the *only* limitations are that the requested discovery must be relevant and authorized by prior

(Continued on following page)

no "cause" for the default. It also properly found no "actual innocence" under *House*. (App. 118a-122a).

Against this backdrop of historical record and the district court's findings, the Fourth Circuit nevertheless held, in a tortured opinion, that the procedural default doctrine was inapplicable after a federal evidentiary hearing. (App. 26a). It erroneously followed a pre-*Keeney* case, *Vasquez v. Hillary*, 474 U.S. 254 (1986), to hold that, where the new facts do not fundamentally alter the claim, the federal court is free to consider them. (App. 27a).

It then confusingly discussed § 2254(e)(2)'s diligence requirement (App. 34a), a statute which addresses when the federal court may *hold a hearing, not when it may consider defaulted facts*. Rather, the determination of whether defaulted facts can be considered is one governed by exhaustion, default, and "cause and prejudice." The Fourth Circuit's out-of-place discussion of § 2254(e)(2), its reliance on a pre-*Keeney*, pre-"cause and prejudice" case, and its alarming misstatement of state law, all in furtherance of its goal of permitting a re-trial in federal court of a reasonably-decided state court decision, must be reversed.[8]

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leave of court. Rule 4:1(b)(5). Rule 4:9A in fact specifically permits subpoenas directed to third parties for the production of documents. None of the discovery rules are preconditioned on a grant of an evidentiary hearing.

[8] The Fourth Circuit said it was "puzzling" that the Warden contended that the district court found Winston failed to exercise the required diligence to constitute "cause." (App. 35a).

(Continued on following page)

This case affords a unique opportunity for the Court to resolve the conflict identified in the courts between the Court's established "cause and prejudice" standard barring new facts in federal court, and § 2254(e)(2)'s separate conditions precedent to any evidentiary hearing in federal court. *See Holland*, 542 U.S. at 653 (declining to decide conflict over what deference is due to new facts presented to federal court); *Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003) (refusing deference to new facts supporting *Brady* claim).

E. AEDPA presents a simple, decisional tree for federal court review of state prisoners' habeas corpus claims.

The lower courts unnecessarily have confused the standard of review mandated by Congress. When presented with a claim of constitutional error by a state prisoner, AEDPA gives the federal court a natural

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However, it was the Fourth Circuit that misread the record when it stated that the district court had found that Winston *had* been diligent. The district court's initial finding of "diligence" was made when it (mistakenly) ordered the evidentiary hearing, *before* Winston came up with his new evidence. *After* the hearing with the new evidence, and *after* Winston failed to satisfy the judge with his excuse for not presenting it to the state court, the district court, in considerable detail, outlined Winston's *lack* of diligence. (App. 110a: "the court exercised its *perceived* discretion to grant an evidentiary hearing" (emphasis added); App. 113a: "he has demonstrated no valid reason why he could not have presented that same evidence to [the state court]").

progression of inquiries. First, the federal court must determine under § 2254(b)(1) whether the prisoner presented his claim to the state court. If so, it must determine under § 2254(d) whether the state court decided the claim on its merits. If there was a merits adjudication, then, under § 2254(d)(1), the federal court must defer to it unless it was contrary to, or an unreasonable application of, clearly established precedent of this Court. *See Renico*, slip op. at 5-6.

If the decision was not unreasonable under (d)(1), the federal court must determine (if at issue) under § 2254(d)(2) whether the state court decision was based on an unreasonable determination of the facts, *e.g.*, where the state court record refutes the state court finding. *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (a finding that counsel's records contained information of sexual abuse in client's childhood was unreasonable because the records contained no such information). Section 2254(e)(1) provides the presumption of correctness of state court findings as well as the burden and standard of proof to overcome them.

In either instance under § 2254(d) – the law or the facts reached by the state court - if the federal court determines them to be *unreasonable*, then the federal court is free to give no deference to the state court decision and to give the claim *de novo* review. But if the federal court finds in each instance that the state court was *not* unreasonable, then the federal court must dismiss the claim without any further consideration.

If the prisoner presents the federal court with new claims or facts which he did not present to the state court, *the inquiry regarding those new matters falls outside the scope of § 2254 entirely*. Rather, they are handled by the existing, familiar, settled standards governing all exhaustion and default questions which pre-dated the AEDPA.

Section 2254(e)(2) comes into play if, and only if, the prisoner first has demonstrated that his claim can be reviewed *de novo*, either because the state court dealt with it unreasonably, or by demonstrating cause and prejudice or actual innocence to excuse his failure to present the new matter first to the state court. But even then, if the prisoner requests an evidentiary hearing on his unreasonably decided (or default-excused) claim, the federal court may not grant his request unless the prisoner shows he diligently tried to develop his facts in the state court under § 2254(e)(2), or, under § 2254(e)(2)(A-B), either that he was not diligent but can demonstrate his claim relies on a new rule made retroactive by this Court, *or* that he could not have discovered the facts earlier *and* he is innocent. *See Williams*, 529 U.S. at 432. Thus, even if the state court decision was unreasonable, or a default is excused, Congress even then requires some respect to the state court decision by prohibiting new fact finding in evidentiary hearings unless the prisoner was diligent in state court, or he can show one of the extraordinary exceptions to the prohibition *against* evidentiary hearings.

AEPDA is not confusing or unclear. The lower federal courts, however, have chafed at its mandate and are reluctant to relinquish any perceived authority to conduct their own *de novo* review of prisoners' claims. This Court must make absolutely clear that, after AEDPA, the federal courts' role in reviewing state prisoners' claims has been dramatically, and appropriately, reduced.

The Fourth Circuit (App. 34a) misapprehended this Court's language in *Schriro v. Landrigan* – that discretion to hold a hearing in federal court which existed before AEDPA "has not changed," 550 U.S. at 473 – as a license for plenary review.[9] At least one other court of appeals similarly has misread this Court's decision. *See Wilson v. Sirmons*, 536 U.S. 1064, 1082 (10th Cir. 2008). This Court needs to clarify that *Landrigan's* holding requires a prisoner first to overcome the prohibition against the granting of a hearing in federal court in § 2254(e)(2), and that even then, the federal court still retains the discretion to deny a hearing under pre-AEDPA standards. 550 U.S. at 473 n. 1 The Fourth Circuit's decision in Winston's case, that it was unconstrained by AEDPA to hold a hearing, even without conducting the § 2254(e)(2) diligence inquiry, was squarely in conflict with *Landrigan*.

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[9] The district court likewise mistook *Landrigan* as a green light to hold a hearing (App. 98a), however, it then correctly applied § 2254(d).

II. The Fourth Circuit's habeas corpus decision conflicts with *Strickland v. Washington* by holding that a claim of ineffective assistance of counsel may be based upon evidence or theories which were non-existent at the time of trial counsel's representation.

The Fourth Circuit's decision remanding for yet another determination by the district court of Winston's claim of ineffective assistance, is so squarely inconsistent with *Strickland v. Washington* and *Knowles v. Mirzayance*, that certiorari and reversal is required. Under § 2254(d), "evaluating whether a rule application [by the state court] was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). *Strickland* claims, governed by a presumption of effectiveness and great deference to counsel's decisions, involve the application of a broadly general rule. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). *Strickland* claims thus must receive double deference by the federal courts. *Id.*; *Mirzayance*, 129 S. Ct. at 1420.

The Fourth Circuit held that Winston's claim that his trial attorneys were ineffective because they decided not to raise a claim of retardation at trial must be determined by reference to (1) Winston's newly-presented IQ score and (2) his argument that the "Flynn effect" theory should reduce his other IQ scores. However, Winston's own state court exhibits demonstrated that Winston's new IQ score was not

available to trial counsel at the time of their representation, and Winston never has contested this fact. Further, the uncontradicted evidence in the district court (CA4 JA 1108-09) established that the first article even suggesting that an individual's IQ score should be adjusted downward (and only in death penalty cases), was published in 2006, *three years after Winston's trial*. *See* Flynn, J., "Capital Offenders and the Death Sentence: A Scandal That Must Be Addressed," *Psychology in Mental Retardation and Developmental Disabilities Newsletter,* Vol. 32, No. 3 at 3 (Spring 2007) (referencing Flynn's own novel theory first put forth in 2006 in his article, "Tethering The Elephant: Capital Cases, IQ, and the Flynn Effect," *Psychology, Public Policy, and Law*, Vol. 12, No. 2 at 170 (2006)).

Under *Strickland*, Winston's trial counsel cannot be found ineffective. The reviewing court is prohibited from using hindsight and must assess counsel's performance based on the circumstances existing at the time of the representation. *Strickland*, 466 U.S. at 689.

While *Strickland* cases are usually distinguishable on their facts, in this case, the Fourth Circuit is in direct conflict with the Eleventh Circuit on a virtually indistinguishable case. In *Wood v. Allen*, the court of appeals upheld the state's reasonable determination that trial counsel made a reasonable, strategic decision not to claim mental retardation at trial. 130 S. Ct. at 846-47. Just as in Winston's case, Wood's trial counsel also had an expert's opinion that Wood

was not retarded and who otherwise would not be beneficial to their client's case. *Id.* at 846. The Fourth Circuit's judgment on this issue conflicts not only with AEDPA and this Court's continuing requirement for deference under AEDPA, but also with *Wood v. Allen* and *Strickland v. Washington*. Certiorari review is warranted to ensure both that this Court's *Strickland* standard is followed and that Congress' intent in AEDPA is carried out.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Dated: May 21, 2010

Respectfully submitted,

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APPENDIX

LEON J. WINSTON, Petitioner-Appellant, v. LORETTA K. KELLY, Warden, Sussex I State Prison, Respondent-Appellee.

No. 09-2

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

592 F.3d 535, 2010 U.S. App. LEXIS 1845

September 23, 2009, Argued
January 27, 2010, Decided

COUNSEL: ARGUED: Jennifer Leigh Givens, FEDERAL COMMUNITY DEFENDER'S OFFICE, Philadelphia, Pennsylvania, for Appellant.

Steven Andrew Witmer, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

ON BRIEF: James H. Moreno, FEDERAL COMMUNITY DEFENDER'S OFFICE, Philadelphia, Pennsylvania, for Appellant.

William C. Mims, Attorney General, Jerry P. Slonaker, Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

JUDGES: Before MICHAEL, GREGORY, and DUNCAN, Circuit Judges. Judge Michael wrote the opinion, in which Judge Duncan joined. Judge Gregory wrote a separate opinion concurring in part and dissenting in part.

OPINION BY: MICHAEL

OPINION

MICHAEL, Circuit Judge.

Leon J. Winston was convicted of capital murder and sentenced to death by the Circuit Court for the City of Lynchburg, Virginia. After failing to obtain relief in state post-conviction proceedings, he petitioned the district court for a writ of habeas corpus. He now appeals the district court's denial of the writ. Winston presents the following issues, as authorized by the certificate of appealability: (1) whether he received ineffective assistance of counsel at the guilt phase of his trial; (2) whether the state trial court unconstitutionally denied his request for a lesser included homicide instruction; (3) whether *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), prohibits his execution because he is mentally retarded; (4) whether he received ineffective assistance when his counsel failed to argue that *Atkins* prohibits his execution; and (5) whether he otherwise received ineffective assistance at the sentencing phase of his trial.

We affirm the district court's denial of Winston's ineffective assistance claims for both the guilt and sentencing phases of his trial; we also affirm the denial of his jury instruction claim. On Winston's *Atkins* and *Atkins-related* claims, however, we conclude that further proceedings in the district court are required. As the district court recognized, because Winston presented material evidence in his federal habeas hearing with respect to the *Atkins-related*

claims that was not considered by the Supreme Court of Virginia, these claims present complex questions concerning the application of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA). A district court may not consider additional evidence in a federal habeas proceeding unless the petitioner has satisfied AEDPA's dual requirements of exhausting state remedies and developing the factual record in the state courts. While these requirements present a high bar for the petitioner, we conclude in this case that Winston cleared the bar. Winston's counsel for both his state and federal habeas applications did not find records of a test score relevant to proving his retardation until two weeks before the evidentiary hearing held by the district court. We hold that it was error for the district court to refuse to consider this evidence because the score does not fundamentally alter Winston's claims and because habeas counsel was diligent in searching for it. We therefore vacate the district court's judgment insofar as it denies Winston's *Atkins* and *Atkins-related* claims, and we remand for further proceedings on these claims.

I.

A.

On the morning of Friday, April 19, 2002, two men broke into Rhonda and Anthony Robinson's house. After confronting the Robinsons near their daughters' second-floor bedroom, one of the men

followed Anthony Robinson downstairs. There, the man shot Anthony several times. He then returned upstairs and shot Rhonda in front of her daughters, Niesha and Tiesha Whitehead. After the shootings the men left, leaving Rhonda and Anthony to die from their wounds. Leon Winston was later arrested and tried for the murders.

At trial two witnesses gave essentially uncontradicted testimony that Winston was present at the Robinsons' when the murders occurred. Michelle Lipford, who had been sexually intimate with Winston, testified that she drove him and a man named Kevin Brown to the Robinson house at about 5:00 a.m. on the morning of the murders. After waiting nearby in the car for an indeterminate time, Lipford heard gun shots and then drove off. Tranika Turner, Winston's girlfriend, testified that in response to a telephone request from Winston at 6:00 a.m. that same morning, she picked him up at a carwash near the Robinson house. Turner noted that when she picked him up, Winston was wearing a black hoodie with gray stripes.

To establish that Winston actually shot the Robinsons, the prosecution offered physical evidence, eyewitness testimony, and a confession. For physical evidence, the prosecution introduced a gun that forensic experts had identified as the murder weapon and on which Winston's DNA – and only Winston's DNA – was found. Robin Wilson testified that shortly after the murders Winston had given him the gun to keep.

For eyewitness testimony, the prosecution relied on nine-year-old Niesha Whitehead. While Niesha witnessed many of the events that transpired the morning of the murders, her testimony was somewhat inconsistent, and she could not directly identify Winston. She did, however, testify that her mother's voice woke her on the morning of the murders and that upon waking, she saw two black-skinned men outside her second floor bedroom. She saw one of the men, whom she called "Mr. No Name," follow Anthony Robinson downstairs. She then heard gunshots and saw Mr. No Name return to shoot her mother, Rhonda Robinson. On direct examination Niesha testified that Mr. No Name had a tattoo that looked like a "big dog," J.A. 39, and wore all black. It is undisputed that Winston has a tattoo on his arm matching the one described by Niesha, but Niesha could not remember whether Mr. No Name's clothing had any stripes on it. On cross examination she answered "Yes" twice when asked whether one man wore all black and one wore black with white stripes. She also answered "Yes" when asked whether the man in white stripes tried to stop Mr. No Name from shooting her mother. Finally, Niesha contradicted her testimony on direct by identifying the man with white stripes as the one with the tattoo.

For evidence of a confession, the prosecution called Nathan Rorls, a long-time friend of Winston's, as a witness. Rorls testified that Winston called him in April of 2002 and told him that he had "slumped two people" in Lynchburg – meaning he had

"murdered somebody, killed somebody." *Id.* at 94. Rorls further testified that the day after he received the call, he saw Winston and Winston's cousin Pego (Peyton Carter) at a friend's house. There, Rorls said that Winston told him he had "killed two people and robbed them and stuff." *Id.* at 98. Rorls recounted that Winston proceeded to describe the crime in detail, noting that he (Winston) and "his codefendant" had taken two thousand dollars and two ounces of cocaine from the Robinsons. *Id.* at 101.

Winston did not take the stand. His counsel thus focused on undermining the credibility of the prosecution's witnesses and highlighting inconsistencies in the physical evidence. Pointing to Niesha Whitehead's testimony concerning the shooter's appearance, defense counsel contended that another man, Tywan Turner, was the likely shooter, and that Winston had tried to prevent the shooting. Counsel also challenged Rorls's testimony as fabricated and given to avoid the long prison term he was facing on drug charges. Finally, counsel challenged the testimony of Lipford and Wilson as unreliable and implausible.

The jury returned a verdict of guilty, convicting Winston of capital murder, robbery, and several lesser crimes. In the sentencing phase defense counsel presented testimony from Winston's family describing his troubled childhood. Winston's mother testified that he had never known his father, that she had been in and out of prison for much of his childhood, and that she regularly used PCP, marijuana, cocaine,

and alcohol both before and after Winston was born. Winston's grandmother testified that she had frequently taken a very young Winston with her when she committed various larcenies. Finally, defense counsel introduced three psychological evaluations of Winston along with some related records, all from Winston's childhood.

The psychological evaluations, however, were not introduced to prove that Winston was mentally retarded under Virginia law. Rather, they were admitted as ordinary mitigating evidence, describing Winston's sub-average intellectual functioning and troubled childhood. Defense counsel took this approach despite the bounty of evidence in those evaluations and related records relevant to a determination of retardation under the applicable Virginia statute. The evaluations were accompanied by I.Q. scores of 77, 73, and 76, respectively. In one of the evaluations the psychologist commented that Winston was functioning in the "[b]orderline range of abilities" and that his "ability to recall specific verbal facts which are typically acquired through education and experience is extremely deficient and falls within the Mentally Retarded range (1st percentile)." J.A. 2133. In another the psychologist found that Winston had "borderline intellect and severe verbal processing problems." *Id.* The psychologist also noted that Winston's immaturity and passiveness "place him at a risk to be easily manipulated by others. He is likely to always follow the easiest path, the strongest leader." *Id.*

Also in defense counsel's possession, but not submitted to the jury, were additional records from the Fairfax County Department of Student Services and Special Education (Fairfax County). These records showed that Winston was eligible for special education due to "mild retardation," that he "demonstrate[d] a reduced rate of intellectual development and a level of academic achievement below that of age peers," and that he "concurrently demonstrate[d] deficits in adaptive behavior." *Id.* at 2133-34. Unlike the psychological evaluations presented to the jury, these records did not include an I.Q. score. An affidavit from a Fairfax County special education professional – obtained long after Winston's trial – indicated that while an additional psychological evaluation and I.Q. test would necessarily have accompanied the County's conclusions about Winston, these additional items had likely been destroyed.

In determining not to pursue a sentencing strategy based on mental retardation, defense counsel apparently relied primarily, if not solely, on the advice of Dr. Evan Nelson, the clinical psychologist appointed to assist Winston during the sentencing phase. Dr. Nelson did an assessment of Winston for use at his sentencing. He reviewed the psychological evaluations and records forwarded to him by counsel and interviewed Winston and members of his family. Dr. Nelson did not interview Winston's teachers and social workers, and he cannot recall whether he saw the Fairfax County record changing Winston's

disability classification to mild retardation. Based on the materials before him at the time, Dr. Nelson told defense counsel that "he did not think [they] could prove [that Winston] was mentally retarded as defined by the Virginia statute." J.A. 2135.

Defense counsel were almost completely dependent on Dr. Nelson's analysis. They did not read Winston's psychological records in their entirety before forwarding them to Dr. Nelson, nor is there any evidence that they reviewed them after receiving Dr. Nelson's opinion. The lawyer tasked with gathering mitigation evidence admitted that he had been unable to review all the records and had "relied on Dr. Nelson to thoroughly review the records and tell [him] what [he] needed to know." J.A. at 2134. Neither of Winston's lawyers read the records containing Fairfax County's change of Winston's disability classification to mild retardation.

After considering the evidence relevant to sentencing, the jury recommended a sentence of death for each of the murders, 73 years for the robbery and related crimes, and $400,000 in fines. The trial court sentenced Winston according to the jury's recommendations, except for suspending the fines. The Supreme Court of Virginia affirmed Winston's convictions and sentence, *Winston v. Commonwealth*, 268 Va. 564, 604 S.E.2d 21 (Va. 2004), and the United States Supreme Court denied certiorari, *Winston v. Virginia*, 546 U.S. 850, 126 S. Ct. 107, 163 L. Ed. 2d 120 (2005).

B.

Winston later petitioned for habeas relief in the Supreme Court of Virginia. *Winston v. Warden of the Sussex I State Prison*, No. 52501, 2007 Va. LEXIS 43, 2007 WL 678266 (Va. Mar. 7, 2007). In his petition Winston requested an evidentiary hearing and raised multiple claims centering on actual innocence, *Atkins*, and ineffective assistance of counsel. The Virginia Supreme Court denied all relief without allowing an evidentiary hearing. 2007 Va. LEXIS 43, [WL] at *18. It concluded that Winston's actual innocence claim was not cognizable in habeas, that his *Atkins* claim had not been raised on direct appeal and therefore was procedurally defaulted, and that his ineffective assistance of counsel claims failed on the merits. 2007 Va. LEXIS 43, [WL] at *1, 3, 6-17. The Virginia Supreme Court did not then have before it Winston's claim that the trial court erred in denying his requested jury instruction on lesser included homicide charges.

Following the denial of his state habeas petition, Winston filed the pending petition in federal district court. In its first opinion, dated May 30, 2008, the district court rejected on the merits Winston's claims of actual innocence, ineffective assistance of counsel at the guilt phase, failure to instruct the jury on lesser offenses, and ineffective assistance of counsel in presenting mitigation evidence at the sentencing phase. However, with respect to Winston's *Atkins* and *Atkins-related* ineffective assistance of counsel claims, the court reserved decision and ordered an

evidentiary hearing. The district court "d[id] not decide that Winston [wa]s entitled to an evidentiary hearing, but rather exercise[d] its discretion" to order one. J.A. 617.

At the hearing the district court heard from nine witnesses over two days and received documentary evidence not presented to the state courts. Of particular importance was the introduction of Winston's missing 1997 psychological evaluation and I.Q. test score from Fairfax County. Just two weeks before the hearing, Winston's habeas counsel found Marilynn Schneider Lageman, the psychologist who administered the test. Lageman testified that she had kept personal copies of Winston's records, and she produced documentation reflecting Winston's I.Q. score of 66. Dr. Daniel Reschly, a mental retardation expert, testified for Winston, opining that "to a reasonable degree of psychological certainty," Winston was mentally retarded under Virginia law before he reached the age of 18. J.A. 2141. After Reschly made what he concluded were proper adjustments for both the Standard Error of Measurement (SEM) and the Flynn effect, the low ranges for Winston's other I.Q. scores were more than two standard deviations below the mean. Reschly further opined that Winston had conceptual, social, and practical adaptive deficits before age 18. In response to Dr. Reschly, the Commonwealth offered an expert, Dr. Leigh Hagan. Dr. Hagan opined that Winston was not mentally retarded before age 18, that there was no basis for adjusting Winston's I.Q. scores due to SEM or the

Flynn effect, and that limitations in Winston's adaptive behavior did not significantly impair his functioning.

Winston's trial counsel and mitigation expert also testified at the district court hearing. Counsel admitted that if they had seen the additional I.Q. score of 66, they would have argued that Winston was retarded and therefore ineligible for the death penalty under *Atkins*. Dr. Nelson testified that, in addition to not having access to the Fairfax County records and I.Q. score, counsel had not provided him with information from certain teachers, social workers, and family members that was relevant to Winston's adaptive functioning. Nelson acknowledged that his prior opinion – that a mental retardation defense was not sustainable – might have been different had he possessed this information.

Following the hearing the district court issued a second opinion, dated March 6, 2009, denying Winston's remaining claims. While the district court reaffirmed its decision to grant an evidentiary hearing, it refused to consider the additional records from Fairfax County, including the I.Q. score of 66, because Winston had failed to exhaust that aspect of his ineffectiveness claim in the state courts. The district court further noted that while Winston had diligently pursued his ineffectiveness claim in the state courts, he had failed to subpoena Lageman or the records of Winston's fourth I.Q. test. After rejecting the additional records from Fairfax County, the district court concluded that nothing excused

Winston's procedural default of his *Atkins* claim and that his ineffective assistance claim failed on the merits. This appeal followed.

II.

We first consider Winston's claims that his conviction should be vacated because he received ineffective assistance of counsel at the guilt phase of his trial or because the trial court erroneously refused to give a lesser-included homicide instruction. We affirm the district court's decision to reject these claims.

A.

Winston claims that his Sixth and Fourteenth Amendment right to effective assistance of counsel was violated during the guilt phase of his trial. He argues that his trial counsel failed (1) "to prove, as they easily could have, that Rorls' testimony was a lie" and (2) to pursue effectively their strategy of "t[ying] [Tywan] Turner to this crime any and every way [they] could." Appellant's Br. at 11, 13. We agree with the district court that the state court did not unreasonably apply federal law in denying this ineffective assistance claim.

When a state court has adjudicated a claim on the merits, a federal court may grant a writ of habeas corpus only if the state court decision "was contrary to, or involved an unreasonable application of, clearly

established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We "review[ ] de novo the district court's application of the standards of 28 U.S.C. § 2254(d) to the findings and conclusions of the [state] court." *McNeill v. Polk*, 476 F.3d 206, 210 (4th Cir. 2007). To prevail on an ineffective assistance claim, a petitioner must establish (1) that counsel's performance was deficient and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish deficient performance, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" to "avoid the distorting effects of hindsight." *Yarbrough v. Johnson*, 520 F.3d 329, 337 (4th Cir. 2008) (quoting *Strickland* 466 U.S. at 689). To establish prejudice under *Strickland*, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Rorls, in a recent affidavit, said that his testimony at Winston's trial was "made up" to get a "bigger sentence cut" in his own drug case. J.A. at 325. Winston argues that Rorls's fabrication would have been apparent to the jury if his counsel had

presented testimony from Winston's cousins, Peyton Carter and Joe Lewis. Carter and Lewis attest in affidavits that they were present at the small gathering at which, according to Rorls's trial testimony, Winston confessed his role in the murders to Rorls for the second time. Both Carter and Lewis swear that they were with or within earshot of Winston the entire time at the gathering, and they did not witness a confession or overhear any private conversation between Winston and Rorls in which Winston confessed. Counsel's failure to interview Carter and Lewis and call them as witnesses, Winston argues, constituted deficient performance that prejudiced his defense.

As the district court observed, Winston's claim that defense counsel should have called Carter and Lewis boils down to the argument that counsel "should have further emphasized that Rorls lied about Winston's admissions in order to reduce Rorls' own prison time." J.A. 594. Defense counsel devoted considerable effort to attacking Rorls's credibility. The very first questions to Rorls on cross-examination were successful in getting him to admit that he was facing a potential life sentence on cocaine conspiracy charges and that he had "dangle[d] out" information to the authorities about the Robinson murders in an effort to shorten his sentence. J.A. 110. Rorls, who had been released from custody, admitted to the jury that he had "bought [his] freedom" with his cooperation. J.A. 109-10. Defense counsel "clearly and repeatedly" used Rorls's admissions to press to the

jury the theme that Rorls was lying to reduce his prison time. J.A. 594.

It is easy for Winston to argue now that the testimony of Carter and Lewis should have been offered as part of the attack on Rorls's credibility. But trial strategy decisions are not evaluated "through the distorting effects of hindsight." *Yarbrough*, 520 F.3d at 337. Defense counsel's strategy of attacking Rorls's credibility in the manner chosen, which was undeniably focused and aggressive, "falls within the wide range of reasonable professional assistance." *Id.*

Winston challenges another strategy decision of defense counsel in arguing that they did not sufficiently develop the theory that Tywan Turner committed the murders. Specifically, Winston argues that counsel should have called Patti Whitehead, the sister of one of the victims and the mother of Turner's children, because she had made a statement to police that Turner was in Lynchburg at the time of the murders. However, one of Winston's defense counsel explained by affidavit that while he and his co-counsel had subpoenaed Whitehead, they did not call her as a witness because they "were unable to talk to her beforehand" and "were unsure what she would say." J.A. 1881. "On habeas review, a federal court generally credits plausible strategic judgments in the trial of a state case." *Vinson v. True*, 436 F.3d 412, 419 (4th Cir. 2006). Here, because defense counsel could not determine beforehand what Whitehead's testimony would be, their decision not to call her was a plausible strategic judgment.

We conclude that defense counsel's representation was not deficient at the guilt phase of Winston's trial. We likewise conclude that the state court did not unreasonably apply *Strickland* in denying Winston's ineffective assistance claim with respect to the guilt phase.

B.

Winston next argues that his due process rights were violated when the state trial judge refused to instruct the jury on lesser included homicide charges. Although Winston did raise this claim on direct appeal, he did not raise it with the Supreme Court of Virginia in his state habeas petition. The state did not argue in the district court, however, that the claim was unexhausted. Because we conclude that the claim should be denied on the merits, we need not reach exhaustion. *See* 28 U.S.C. § 2254(b)(2).

"In capital cases, due process requires the court to give an instruction on any lesser included offense when the evidence warrants such an instruction." *Bates v. Lee*, 308 F.3d 411, 418 (4th Cir. 2002) (citing *Beck v. Alabama*, 447 U.S. 625, 637-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). "*Beck* requires a lesser-included offense instruction when the evidence at trial . . . casts 'some doubt' on a necessary element of the capital charge." *Hyatt v. Branker*, 569 F.3d 162, 174 (4th Cir. 2009). Because each state inevitably has its own rule for when its courts should instruct a jury on lesser included offenses, a federal court first

determines whether the state rule offends the federal rule. *See Hopper v. Evans*, 456 U.S. 605, 611-12, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982); *see also Beck*, 447 U.S. at 628-29. Here, there is no material distinction between the Virginia rule and the federal one. *See Remington v. Commonwealth*, 262 Va. 333, 551 S.E.2d 620, 632-33 (Va. 2001) ("[a] second degree murder instruction is only appropriate where it is supported by the evidence"); *Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48, 54 (Va. 1980) (noting that *Beck* left the Virginia rule unchanged). The Virginia rule therefore poses no constitutional problem on its face; indeed, its application is equivalent to application of the federal rule for the purposes of AEDPA. Accordingly, we consider only whether the state courts' application of the Virginia rule was reasonable.

Winston argues that the evidence permitted the inference that he was not the triggerman and therefore supported an instruction on non-capital murder. Except in the case of murder for hire, Virginia law bars conviction of a capital crime when the accused was not the actual perpetrator. *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267, 280 (Va. 1986). Given Tranika Turner's unrebutted description of Winston's clothing that evening as being black with grey stripes, Winston contends that a reasonable jury could have concluded from Niesha Whitehead's testimony that his accomplice fired the fatal shots. Winston points specifically to Niesha's testimony that the shooter wore all black and the other man present

wore black with white stripes. The jury could therefore have credited Niesha's testimony and disqualified Winston as the triggerman.

Winston ignores the fact that the state court considered this slice of testimony in the context of a wealth of evidence indicating that he was the shooter. As the Virginia Supreme Court held on direct appeal, "[i]n light of the overwhelming evidence indicating that Winston was the triggerman responsible for Rhonda's death, we cannot say that a short passage excerpted from Niesha's testimony was sufficient to merit jury instructions on first or second degree murder, or accessory after the fact." *Winston*, 604 S.E.2d at 44. The evidence at trial pointing to Winston included: Rorls's testimony that Winston confessed to being the shooter; testimony that the gun used in the killings was in Winston's possession and had his DNA on it; Niesha's testimony that a man with a tattoo matching Winston's was the shooter; and Winston's own admission that he was present when the shootings occurred. When the several pieces of evidence pointing to Winston's guilt are measured against the small portion of Niesha's testimony concerning the shooter's clothing – which is itself inconsistent – we cannot conclude that the trial court unreasonably applied controlling law by failing to give the lesser-included offense instruction.

The dissent reaches the opposite conclusion by minimizing the significance of relevant evidence and failing to exercise sufficient deference under AEDPA. The dissent argues that Niesha Whitehead's

testimony was consistent with Winston not being the triggerman. However, there is little doubt that Niesha's testimony was inconsistent, with even the dissent noting that Niesha identified both the man in black and the man with stripes as having the "big dog" tattoo. This inconsistency tends to undermine Niesha's testimony as a whole rather than provide reliable evidence supporting the inference that Winston was not the triggerman. Similarly, Niesha's initial failure to remember whether the shooter wore white stripes undermines the black and white distinction defense counsel tried to draw between the two perpetrators.

The dissent appears not to be troubled by the weaknesses in Niesha's testimony because it concludes that "[o]ther than the testimony of Rorls, whose credibility was questioned at trial, no evidence relied on by the majority can be characterized as 'overwhelming' evidence that Winston was the triggerman." *Infra* at 563. While the dissent is quick to minimize Rorls's testimony, it was properly admitted into evidence and clearly implicates Winston as the shooter. The fact that Rorls later recanted is irrelevant to our analysis under AEDPA. *See Holland v. Jackson*, 542 U.S. 649, 652, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004) ("[W]hether a state court's decision was unreasonable must be assessed in light of the record the court had before it."). Similarly, the presence of Winston's DNA on the murder weapon, which was itself entrusted to another by Winston after the murders, permits an

inference that Winston was the triggerman. In light of this additional evidence, it was not unreasonable for the Virginia Supreme Court to characterize as "overwhelming" the evidence that Winston was the triggerman.

We cannot see how the dissent can conclude otherwise under AEPDA's deferential standard. The dissent states that "the state court made an unreasonable determination of the facts" when it found that there was overwhelming evidence that Winston was the triggerman. *Infra* at 48-49. The "finding" that the dissent points to is a legal determination that the evidence did not support giving a lesser included homicide instruction. Proper consideration of this determination is under § 2254(d)(1) rather than § 2254(d)(2). But even if the dissent has identified the correct standard, it has not demonstrated why the state court's determination was not only incorrect but also unreasonable. The Virginia Supreme Court concluded that no rational juror could have discounted Rorls's testimony, the evidence concerning the murder weapon, and Winston's presence at the scene and still credited Niesha's testimony that a man with white-striped clothing and a tattoo tried to stop the shooting. Assuming this conclusion was error because it crossed the line between making the legal determination of whether an inference is rational and weighing the

evidence, it was not an unreasonable conclusion at variance with AEDPA.[1]

Finally, we disagree with Winston that we should grant him relief because the facts here closely resemble the facts of *Beck*. In *Beck* the evidence was sufficient to establish that the defendant was guilty of a serious, violent offense but left some doubt as to whether he had committed a capital offense. The jury, however, was instructed only on the capital charge. Thus, the jury potentially faced the choice of either convicting the defendant of capital murder because it believed that he was "guilty of some serious crime and should be punished" – an impermissible reason – or acquitting because "whatever his crime, the defendant does not deserve death" – an equally impermissible reason. *Beck*, 447 U.S. at 642. The Supreme Court held that an instruction on the lesser included offense was necessary in these circumstances. Winston's jury, however, did not face the choice of death or acquittal because it was also instructed on robbery and related charges. More important, unlike the state court in *Beck*, the Supreme Court of Virginia concluded that the evidence against Winston on the capital charge was

[1] The dissent stresses that *Beck* does not present a sufficiency of the evidence issue. We agree. The fact that the evidence supported the jury's verdict is not dispositive. However, we disagree with the dissent to the extent it assumes that evidence besides Niesha's testimony is irrelevant to answering the *Beck* inquiry.

overwhelming. This reasonable conclusion did not leave room for the quantum of doubt required by *Beck*. Accordingly, *Beck* did not mandate a lesser-included offense instruction.

III.

We next consider Winston's claims that his sentence should be vacated because: (1) *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), bars his execution; (2) he received ineffective assistance when his counsel failed to argue that *Atkins* barred his execution; and (3) he received ineffective assistance when his counsel failed to adequately present mitigating evidence during the sentencing phase. Our treatment of Winston's *Atkins-related* ineffective assistance claim renders analysis of Winston's *Atkins* claim unnecessary. Winston concedes that his *Atkins* claim is procedurally barred absent a valid excuse, and ineffective assistance is one such excuse. Because we vacate the district court's decision and remand on Winston's *Atkins-related* ineffective assistance of counsel claim, we need not decide on this appeal whether any other excuse applies.

A.

Winston claims that he received ineffective assistance when his counsel failed to mount a defense under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). In *Atkins* the

Supreme Court held that the Eighth Amendment prohibits the execution of the mentally retarded, but it left to the states the task of enforcing the constitutional restriction. *Id.* at 306, 317. The Virginia legislature enacted a statute defining mental retardation shortly after *Atkins* was decided. To prove mental retardation under the statute, the accused must establish a disability, "originating before the age of 18 years," characterized by both

> (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

Va. Code. Ann. § 19.2-264.3:1.1(A). The Supreme Court of Virginia later held that "[w]hether [a defendant] is mentally retarded [is] a factual issue for the jury to determine." *Atkins v. Commonwealth*, 272 Va. 144, 631 S.E.2d 93, 98 (Va. 2006).

The district court rejected Winston's *Atkins-related* ineffective assistance claim, concluding that *Strickland*'s prejudice requirement had not been satisfied. Proving prejudice required Winston to demonstrate a reasonable probability that a fact-finder would have determined he was mentally retarded under Virginia law. In rejecting Winston's claim in his state habeas

proceeding, the Virginia Supreme Court focused on whether Winston had demonstrated "significantly subaverage intellectual functioning." To this end, Winston had presented the state court with I.Q. scores of 77, 73, and 76 as well as evidence that Fairfax County had diagnosed him with mild retardation in 1997. The Virginia Supreme Court rejected the three I.Q. scores as evidence of retardation because it had previous held "that the maximum score for a classification of mental retardation [was] an I.Q. score of 70." J.A. 305. The court rejected the Fairfax County diagnosis because it had been made for the purpose of establishing special education eligibility, and the definition of mental retardation used by the county did not require an I.Q. score below 70. The district court concluded that the Virginia Supreme Court's determination was not objectively unreasonable.

In reaching its decision, however, the district court refused to consider new evidence that Fairfax County did indeed give Winston an I.Q. test and that the score was 66 -- clearly below 70. In Winston's state habeas proceedings, the Virginia Supreme Court had denied, without explanation, his motion for discovery and an evidentiary hearing to further develop the factual basis of his claims. Consequently, it was not until two weeks before the evidentiary hearing scheduled by the district court that Winston, through the efforts of his counsel, was able to obtain the additional test score. The district court noted that the new evidence "raise[d] interrelated questions of

whether Winston failed to develop in state court proceedings the factual basis he now relies on to support his ineffective assistance claim and whether Winston has failed to exhaust that claim." J.A. 2148. After the evidentiary hearing, however, the district court concluded that both questions were "perhaps best viewed analytically as exhaustion questions." *Id.* It determined that the potentially dispositive new evidence should not be considered on the merits because it rendered Winston's claim unexhausted.

The application of AEDPA is, of course, implicated in the question of whether the district court should have considered Winston's new evidence. We agree with the district court's original observation that the question raises both an exhaustion issue and a failure-to-develop issue. We disagree that the two issues should be collapsed into an exhaustion issue post hearing, and we therefore consider each in turn. *See Boyko v. Parke*, 259 F.3d 781, 788-92 (7th Cir. 2001). Finally, we note that because mental retardation is at bottom a factual issue, review of Winston's new evidence implicates § 2254(d)(2) and § 2254(e)(1), both provisions of AEDPA governing federal habeas review of state court factual findings. Because we conclude that the district court should have considered the evidence, we will discuss the appropriate application of these provisions on remand.

I.

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1). The exhaustion requirement applies as much to the development of facts material to a petitioner's claims as it does to the legal principles underlying those claims. *See Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998). For a claim to be exhausted, "both the operative facts and the controlling legal principles must be presented to the state court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (quotation marks and citations omitted). If the rule was otherwise, petitioners could "expedite federal review by deliberately withholding essential facts from the state courts," thus upsetting the careful balance struck by Congress between respecting the finality of state court judgments and enforcing federal rights. *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986). The exhaustion requirement does not, however, prohibit a district court from considering evidence not presented to the state courts. "[S]upplemental evidence" that does not "fundamentally alter the legal claim already considered by the state courts" can properly be considered by a district court. *Id.* The question of when new evidence "fundamentally alters" an otherwise exhausted claim "is necessarily case and

fact specific." *Morris v. Dretke*, 413 F.3d 484, 491 (5th Cir. 2005).

In *Vasquez v. Hillery* the Supreme Court addressed the tension between the exhaustion requirement and consideration of new evidence. In that case the petitioner alleged that African-Americans had been systematically excluded from the grand jury that indicted him. In the federal habeas proceeding, the petitioner introduced two categories of evidence that had not been presented to the state courts: (1) affidavits stating that qualified African-Americans had been available but had not been called; and (2) statistical evidence – based on census data that had been available to the state courts – assessing the mathematical probability that chance could have accounted for the exclusion of African-Americans from grand jury panels. The Court held that the affidavits supported a proposition already well-substantiated by the record before the state courts and that the statistical analysis "added nothing to the case that th[e] Court had not considered intrinsic to the consideration of any grand jury discrimination claim." 474 U.S. at 259. Without further explanation, the Court concluded that this evidence could be considered because it did not fundamentally alter the petitioner's equal protection claim.

We read *Vasquez* to permit a district court to consider new evidence if it supports factual allegations for which there is already at least some support in the state record. The evidence in *Vasquez*

was supplemental insofar as there was already evidence in the state record from which a fact-finder could reasonably determine the existence of facts essential to the petitioner's claim. This reading is consistent with circuit precedent requiring petitioners to present the operative facts of their claims to the state courts. *Matthews*, 105 F.3d at 911. We note that the *strength* of the evidence in the state court record is irrelevant to our interpretation. Suppose, for example, that a petitioner on federal habeas introduces new evidence to establish the existence of fact X, a fact required to prove his claim. The claim will inevitably be stronger, regardless of the evidence the petitioner presented to the state courts. However, if the petitioner presented *no evidence* to the state courts to establish the existence of fact X, the claim will be fundamentally altered by the new evidence presented to the district court.

The district court concluded that the addition of Winston's 1997 I.Q. score of 66 fundamentally altered his ineffective assistance of counsel claim under *Vasquez*. It relied primarily on two rationales, the first centering on the potentially dispositive nature of the evidence:

> Had the Supreme Court of Virginia confronted a full-scale I.Q. score of 66, it might have viewed the *Strickland* prejudice prong differently. Instead, Winston presented three scores over 70 and evidence that a likely non-retrievable fourth score might have been under 70. Therefore, there is a

> substantial difference between the operative facts that the Supreme Court of Virginia confronted and the operative facts here.

J.A. 2150. As an alternative rationale, the district court cited counsel's failure to ask the Virginia Supreme Court for subpoena power. With that power, counsel could have subpoenaed Lageman and discovered the score during state habeas proceedings. Because counsel could have obtained and presented the score to the state court, the district court reasoned that they cannot now present it to the federal courts.

We conclude that the district court erred in its analysis. First, it is irrelevant to the "fundamentally alters" inquiry whether the Virginia Supreme Court would have decided the claim differently had it seen the new evidence presented by Winston. As noted above, whether new evidence fundamentally alters a claim does not depend on whether it makes the claim stronger. The key is whether Winston offered some evidence in state court to support the factual claim that he possesses significantly sub-average intellectual functioning as measured by a standardized test. Winston presented evidence to the Virginia Supreme Court that Fairfax County had diagnosed him as mentally retarded based on standardized testing, that one I.Q. score should be considered below 70 due to the Flynn effect, and that he possessed substantial deficits in adaptive behavior. While the Virginia Supreme Court was unpersuaded in the absence of an actual score below 70, the court's

determination was based on the weight of the evidence rather than the lack of *any* evidence to support Winston's claim.

Wise v. Warden, Maryland Penitentiary, 839 F.2d 1030 (4th Cir. 1988), a case cited by the district court, does not preclude our analysis. In *Wise* the petitioner claimed that the prosecution had violated *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), by withholding a cooperation agreement with a key witness. In the state courts the petitioner had offered little more than "bald assertions" and the affidavit of a fellow inmate attesting to the existence of the agreement. *Wise*, 839 F.2d at 1032, 1034. In the district court, however, the petitioner presented the agreement itself as well as statements by the inmate-witness to the police. *Wise* held that the claim had not been exhausted, noting that there was "a world of difference between conjecture and proof" and that mere conjecture was all that supported the petitioner's claim when it was presented to the state courts. *Id.* at 1034. While *Wise* did refer to the "significantly different and stronger evidentiary posture" of the petitioner's claim in the district court, *id.* at 1033 (quoting *Brown v. Estelle*, 701 F.2d 494, 495 (5th Cir. 1983)), it used the words "*significantly different* and stronger" to distinguish a claim without evidentiary support from one with evidentiary support. Unlike the case before us today, no reasonable fact-finder in *Wise* could have found the facts necessary to support the petitioner's claim from the evidence presented to the state courts.

The district court's alternative rationale fares no better. Winston's failure to request a subpoena from the Virginia Supreme Court is simply not relevant to the "fundamentally alters" inquiry. Indeed, considering this "failure" conflates the exhaustion inquiry with the standard for obtaining an evidentiary hearing under 28 U.S.C. § 2254(e)(2), which we discuss below. We note, however, that even if Winston's efforts in the state proceedings were relevant, the district court would have been wrong to hold Winston responsible for failing to seek a subpoena. Death penalty habeas petitioners seeking discovery in Virginia are required by statute to request an evidentiary hearing from the Virginia Supreme Court. *See* Va. Code. § 8.01-654(c)(1); *see also Hedrick v. Warden of the Sussex I State Prison*, 264 Va. 486, 570 S.E.2d 840, 862 (Va. 2002). Only if that court grants the hearing request and refers the petitioner to a circuit court for discovery would a subpoena request be appropriate. Here, Winston did request an evidentiary hearing from the Virginia Supreme Court, and that hearing was denied. Requesting a subpoena directly would have been procedurally improper, and Winston cannot be faulted for failing to take that step.

2.

In district court the state did not argue that the introduction of the 1997 I.Q. score fundamentally altered Winston's ineffective assistance claim. Instead, it argued that the court could not consider

the score because Winston had failed to develop the factual basis of his claim in the state courts. At oral argument before us, the state continued to advance this failure-to-develop argument despite tacit acknowledgment that the district court had correctly applied the "fundamentally alters" test. We agree that the question of whether Winston failed to develop the factual basis of his claim in the state courts is independent of the exhaustion question. We conclude, however, that Winston did not fail to develop the factual record in state court.

The requirement that petitioners develop the factual basis of their claims in the state courts has its source in 28 U.S.C. § 2254(e)(2):

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that
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> (A) the claim relies on
>
> (I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The Supreme Court has held that the word "failed" in the opening line of this section connotes fault. *Michael Williams v. Taylor*, 529 U.S. 420, 431-32, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). Specifically, it held that "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. If a district court concludes that the petitioner was diligent in developing the factual basis of his claim, it may grant an evidentiary hearing as an exercise of discretion. *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) ("Prior to [AEDPA], the decision to grant an evidentiary hearing was generally left to the sound discretion of district courts. That basic rule has not changed."). This discretion should, however, be exercised with restraint. "[F]ederal evidentiary hearings ought to be the exception, not the rule." *Pike v. Guarino*, 492 F.3d 61, 70 (1st Cir. 2007). They are not "intended to provide a forum in which to retry state cases," but rather their "prototypical purpose [is] to fill a gap in the record or to supplement the record on a specific point." *Id.* As the Supreme Court has said: "Because the deferential standards prescribed by [AEDPA]

control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Schriro*, 550 U.S. at 474.

In its first opinion the district court concluded that it had discretion to grant Winston a hearing on his *Atkins* and *Atkins-related* ineffective assistance claims, and it exercised that discretion. After citing to the requirements of § 2254(e)(2), the district court held that: "(1) Winston diligently pursued his habeas corpus claims that *Atkins* bars his execution and that he received ineffective assistance of counsel through the failure to investigate this claim; and (2) it is not wholly implausible that he could establish his claims even in light of AEDPA's deferential standards." J.A. 617. In its post-hearing second opinion the district court declined to reconsider its finding of diligence. It is therefore somewhat puzzling that the state goes so far as to declare in its brief that "[t]he district court's finding with respect to Winston's failure to develop this claim is exceptionally clear: Winston did not exercise due diligence." Appellee's Br. at 37. The state is wrong.

Perhaps the district court confused the state by considering Winston's failure to seek a subpoena in its analysis of the exhaustion question. Whether Winston could have or should have sought a subpoena is relevant to the issue of Winston's diligence, not the issue of exhaustion. In any event, we do not read the district court's discussion of the subpoena matter as a retreat from its otherwise clear finding of diligence.

Moreover, as we have noted, whatever fault the district court assigned to Winston for failing to seek a subpoena was simply misplaced.

Finally, we cannot say that the district court abused its discretion in holding an evidentiary hearing. The district court specifically considered whether to hold a hearing in light of AEDPA's deferential standards, and the court concluded that it was not implausible that Winston would succeed if he proved the facts alleged in his petition. Winston had never had a hearing on his *Atkins* and *Atkins*-*related* ineffective assistance claims because the Virginia Supreme Court denied him one, and the district court acted properly to provide him such an opportunity on a colorable claim. The district court narrowly tailored the hearing to supplement the record on a particular issue, and there was no attempt to retry the entire case against Winston.

Because we can find no legitimate justification for the district court's exclusion of Winston's 1997 I.Q. score, we conclude that remand is appropriate so that the court can reconsider Winston's *Atkins*-*related* ineffective assistance claim with the score in evidence. The district court was wrong to exclude the score on the ground that it rendered Winston's claim unexhausted, and the state is wrong that the score should have been excluded because the hearing in which the score was introduced was improperly granted. Winston is entitled to a decision on his claim based on all of the admissible evidence in the record.

We remand for the district court to make this decision in the first instance.

3

The issue remains as to what standard of review the district court should apply on remand. Winston insists that the district court should apply § 2254(e)(1) because that provision applies exclusively when an evidentiary hearing is appropriate in federal court. The state counters that the district court was right to apply § 2254(d)(2). While we reject Winston's argument that § 2254(d)(2) will never apply once the district court has granted an evidentiary hearing, we conclude that it does not apply in this particular case. The district court should still apply § 2254(e)(1) to any factual findings made by the state court and make any additional findings necessary to resolve Winston's claims. Once the facts are determined, the district court should apply *Strickland*'s standards without any deference to the decision of the Supreme Court of Virginia. The Virginia court had its opportunity to consider a more complete record, but chose to deny Winston's request for an evidentiary hearing. Accordingly, comity and finality do not require deference when material evidence later surfaces in a federal habeas hearing.

1.

Section 2254(d) provides AEDPA's framework for reviewing habeas petitions:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(d)(1) describes the standard of review to be applied to claims challenging how the state courts applied federal law, while § 2254(d)(2) describes the standard to be applied to claims challenging how the state courts determined the facts. Both provisions direct federal courts to assess the reasonableness of the state court determinations, and both assessments must be made in light of the evidence the state courts had before them. *Holland*, 542 U.S. at 652. The only limitation on § 2254(d)'s application is that the claims submitted must have been "adjudicated on the merits" in state court. When a claim has not been adjudicated on the merits by the state court, a federal court reviews the claim de novo. *Cone v. Bell*, 129

S. Ct. 1769, 1784, 173 L. Ed. 2d 701 (2009); *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003); *Wilson v. Workman*, 577 F.3d 1284, 1290 (10th Cir. 2009); *Pike*, 492 F.3d at 67; *Drake v. Portuondo*, 321 F.3d 338, 345 (2d Cir. 2003).

A state court's judgment is unreasonable under § 2254(d)(1) "if the state court correctly identifies the governing legal principle from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case." *McNeill v. Polk*, 476 F.3d 206, 211 (4th Cir. 2007) (quotation marks and citations omitted). The state court's application, however, "must have been more than incorrect or erroneous. . . . [It] must have been 'objectively unreasonable.'" *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quotation marks and citations omitted); *accord Terry Williams v. Taylor*, 529 U.S. 362, 410-12, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A similar analysis naturally applies to the analogous and adjacent language in § 2254(d)(2). For a state court's factual determination to be unreasonable under § 2254(d)(2), it must be more than merely incorrect or erroneous. *Schriro*, 550 U.S. at 474. It must be sufficiently against the weight of the evidence that it is objectively unreasonable.

An apparent tension between § 2254(d)(2) and § 2254(e)(1) arises because the latter section provides an alternate and seemingly inconsistent standard for review of state court factual determinations:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

This section does not concern itself with the reasonableness of factual determinations by the state courts but with the correctness or incorrectness of those determinations. It further assigns a burden of proof to the petitioner – clear and convincing evidence – for negating them. Finally, unlike § 2254(d), there are no limitations on the application of § 2254(e). The precise interplay between these provisions has split the courts of appeals. *See Lambert v. Blackwell*, 387 F.3d 210, 234 (3d Cir. 2004) ("a comprehensive interpretation of AEDPA's factual review scheme has yet to emerge from the federal courts"); *Wood v. Allen*, 542 F.3d 1281, 1303-05 & n.23 (11th Cir. 2008);[2] *Teti*

[2] The Supreme Court granted certiorari in *Wood v. Allen* and issued its decision on January 20, 2010, without addressing the question we consider above. The Court acknowledged that "[a]lthough we granted certiorari to resolve the question of how §§ 2254(d)(2) and (e)(1) fit together, we find once more that we need not reach this question, because our view of the reasonableness of the state court's factual determination in this case does not turn on any interpretive difference regarding the relationship between these provisions." *Wood v. Allen*, No. 08-9156, 558 U.S. ___, 130 S. Ct. 841, 175 L. Ed. 2d 738, 210

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v. Bender, 507 F.3d 50, 57-58 (1st Cir. 2007); *Guidry v. Dretke*, 397 F.3d 306, 324-27 (5th Cir. 2005); *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004).

The Supreme Court has held that § 2254(d)(2) and § 2254(e)(1) provide "independent requirements" for review by the federal courts. *Miller El v. Cockrell*, 537 U.S. 322, 341, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). The sections should not, for instance, be merged to "require [the] petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence." *Id.* Both provisions apply independently to all habeas petitions. "To secure habeas relief, petitioner must demonstrate that a state court's [factual] finding . . . was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), *and* that [it] was 'objectively unreasonable' in light of the record before the court." *Id.* at 348 (emphasis added), *accord Miller-El v. Dretke*, 545 U.S. 231, 266, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). The Supreme Court has nevertheless left open the precise question of when and how § 2254(e)(1)'s presumption of correctness applies. *See Rice v. Collins*, 546 U.S. 333, 339, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006).

Given these principles, we conclude that § 2254(d)(2) and § 2254(e)(1) will both ordinarily apply even after a district court has properly held an evidentiary hearing. First, we can discern nothing

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U.S. LEXIS 763, *18-19 (Jan. 20, 2010). Nothing in our opinion today is inconsistent with the Court's decision.

inconsistent with the concurrent application of § 2254(d)(2) and § 2254(e)(1) after a district court has held an evidentiary hearing. If a petitioner succeeds under § 2254(e)(1), he has merely proven that the state court finding was incorrect. To satisfy § 2254(d)(2), the petitioner must prove that the state court was not only incorrect, but also objectively unreasonable. Second, § 2254(e)(1) should apply because there is no limitation in the section's text. While there might a situation when it would be improper to apply a presumption of correctness to state court factual findings, for example, when the state proceedings violated due process, this would be the exception rather than the rule. *See Taylor,* 366 F.3d at 1000; *see also* 1 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 20.2c. Third, the only limitation on § 2254(d)(2) – that the claim have been adjudicated on the merits – will not automatically apply simply because the district court held an evidentiary hearing. If the record evidence after the hearing is substantially the same as the evidence presented to the state court, there is no reason why the district court cannot assess whether the state court made an "unreasonable determination of the facts in light of the evidence" presented to it.

When, however, the petitioner offers, for the first time in federal habeas proceedings, new, material evidence that the state court could have considered had it permitted further development of the facts, an assessment under § 2254(d) may be inappropriate.

The requirement that § 2254(d) be applied only to claims "adjudicated on the merits" exists because comity, finality, and federalism counsel deference to the judgments of state courts when they are made on a complete record. *Cf. Michael Williams*, 529 U.S. at 436. "In this respect, the 'exhaustion' and 'adjudicated on the merits' elements of federal habeas practice are mirror images." *Wilson*, 577 F.3d at 1292. Exhaustion requires that the state courts have an opportunity to apply the law and consider all the evidence relevant to the petitioner's claim. *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004); *Vasquez*, 474 U.S. at 257. When a state court refuses to opine on the merits of a claim properly presented to it, exhaustion is satisfied. *Cone*, 129 S. Ct. at 1784; *Pike*, 492 F.3d at 67. Similarly, when a state court forecloses further development of the factual record, it passes up the opportunity that exhaustion ensures. *Wilson*, 577 F.3d at 1292-93; *Drake*, 321 F.3d at 345; *see also Monroe*, 323 F.3d at 297-98. If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d). *Wilson*, 577 F.3d at 1292; *Drake*, 321 F.3d at 345. New, material evidence, introduced for the first time during federal habeas proceedings, may therefore require a de novo review of petitioner's claim.

Our conclusion is not new to this circuit. In *Monroe v. Angelone*, 323 F.3d 286 (2003), we held that

"AEDPA's deference requirement does not apply when a claim made on federal habeas review is premised on *Brady* material that has surfaced for the first time during federal habeas proceedings." *Id.* at 297. In *Monroe* the petitioner had sought habeas relief from the Supreme Court of Virginia for violations of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), based on nine categories of exculpatory evidence allegedly withheld by the prosecution. The petitioner had also sought discovery to seek disclosure of additional evidence that might have been withheld. The state court denied his claims and "refused, without explanation, to authorize . . . discovery." *Monroe*, 323 F.3d at 294. The federal district court, however, granted discovery and an evidentiary hearing, and the petitioner uncovered several additional categories of withheld exculpatory evidence. On appeal we held that de novo review was appropriate for those portions of petitioner's *Brady* claim that were based on the new evidence. *Id.* at 297. In addition, we held that it was necessary to consider all the evidence in the record – not just the new evidence – because the materiality element of a *Brady* claim requires a collective assessment of whether introduction of the exculpatory evidence might have affected the outcome of the trial. As a result, we could not "accord AEDPA deference on an item-by-item basis to the . . . items of exculpatory material considered in state court." *Id.* at 298.

Our conclusion in this case is also consistent with holdings reached in similar cases in the Second and

Tenth Circuits. In *Drake v. Portuondo*, 321 F.3d 338 (2d Cir. 2003), the Second Circuit concluded that de novo review of the petitioner's due process claim was appropriate when "the state courts did not permit the development of the factual record" and therefore relied on an incomplete record in denying the claim. *Id.* at 345. Indeed, the Second Circuit actually remanded the case for discovery and an evidentiary hearing. In *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009), the Tenth Circuit, sitting en banc, concluded that de novo review of the petitioner's ineffective assistance claims was appropriate because the Oklahoma state courts denied the claims based "on a factual record that was, solely as a result of [a] state procedural rule, incomplete." *Id.* at 1290-91. Like the Virginia Supreme Court in this case, the Oklahoma Court of Criminal Appeals denied the petitioner an evidentiary hearing and therefore passed up any opportunity to consider evidence material to the petitioner's ineffective assistance claim.

The court in *Wilson* also addressed what might be an additional concern with our conclusion today: that habeas petitioners seeking de novo review of their claims need only produce some small sliver of new evidence in federal court. Like the *Wilson* court, we conclude that this concern is "greatly exaggerated." *Id.* at 1294. As we have emphasized above, the requirements that petitioners exhaust their state remedies and diligently develop the record in state court are exacting burdens. Even if the state

courts deny a petitioner's request for an evidentiary hearing, new evidence surfacing in federal court that fundamentally alters a claim will render the claim unexhausted. Similarly, while requesting an evidentiary hearing from the state courts may be necessary to satisfy § 2254(e)(2)'s diligence requirement, it may not always be sufficient. *See Michael Williams*, 529 U.S. at 437 ("Diligence will require in the usual case that the prisoner, *at a minimum*, seek an evidentiary hearing in state court in the manner prescribed by state law.") (emphasis added). "In light of these safeguards, we see little risk that habeas petitioners will misapply [our] holding to obtain unwarranted de novo review in the federal courts." *Wilson*, 577 F.3d at 1295.

ii.

Turning more specifically to this case, we hold that § 2254(d) does not apply to Winston's *Atkins*-*related* ineffective assistance claim and that the district court should not afford deference to the Supreme Court of Virginia's application of *Strickland*. Winston's additional I.Q. score is material to whether he is retarded under Virginia law and therefore material to whether he was prejudiced under *Strickland* by his counsel's conduct. Moreover, like the petitioner in our *Monroe* opinion, Winston requested discovery and an evidentiary hearing from the state court to further develop the factual record. Like the state court in *Monroe*, the Virginia Supreme Court denied Winston's request and passed on the

opportunity to adjudicate Winston's claim on a complete record. Finally, as in *Monroe*, the state court adjudicated a claim that was materially incomplete. The deficient performance and prejudice inquiries under *Strickland* present mixed questions of law and fact, *Smith v. Moore*, 137 F.3d 808, 817 (4th Cir. 1998), that require a collective evaluation of the evidence rather than an analysis confined to a subset of the facts. *See Kyles v. Whitley*, 514 U.S. 419, 436-37, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *see also Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003). Consequently, the Virginia Supreme Court's legal conclusions are not neatly separable into those based on a complete record and those based on an incomplete record. Accordingly, on remand the district court should not afford any deference under AEDPA to the Virginia Supreme Court's application of the *Strickland* standards.

AEDPA deference under § 2254(e)(1), however, will be appropriate to any relevant factual findings made by the Virginia Supreme Court. While that court does not appear to have found that Winston was not mentally retarded – a factual matter – we note that it did make several factual findings concerning the tests Winston took and the Fairfax County assessment procedures. On remand these findings are entitled to a presumption of correctness, and should Winston wish to overcome this presumption, he will have to do so by clear and convincing evidence. Where the Virginia Supreme Court did not make a factual

finding, the district court must make its own without regard to what the state court might have done.

Finally, in making its factual determinations, the district court should not only consider Winston's 1997 I.Q. score, but also decide whether to consider Winston's proffered evidence concerning the Flynn effect and SEM. The only time the Virginia Supreme Court has even mentioned the Flynn effect in a published opinion was in this case, and it has never considered the effect of SEM. The Virginia court did not discuss the Flynn effect beyond stating that Winston had offered evidence concerning it. The court concluded that:

> This Court has previously held that the maximum score for a classification of mental retardation is an I.Q. score of 70. Petitioner provides no documentation that he was diagnosed as being mentally retarded before the age of 18 in accordance with the legal definition of mental retardation established by the legislature. Thus, petitioner has failed [to satisfy the requirements of *Strickland*].

J.A. 305-06 (citations omitted). The most that can be reasonably inferred from this holding is that the Virginia Supreme Court was unconvinced by Winston's evidence concerning the Flynn effect and SEM. While a federal court sitting in habeas could not conclude that such a holding violated § 2254(d), *see Green v. Johnson*, 515 F.3d 290, 300 n.2 (4th Cir. 2008), the district court will not be applying Section 2254(d) on remand. Instead, it will be

weighing Winston's expert evidence, documentary evidence, and proffered testimony – taking § 2254(e)(1) into account when necessary – to determine the facts. Once determined, the district court will consider de novo whether there is a reasonable probability that, but for his counsel's deficient performance, Winston would have succeeded on his *Atkins* claim.

B.

Lastly, we affirm the district court's denial of Winston's claim that he received ineffective assistance when his counsel failed to present an adequate case in mitigation. The Supreme Court of Virginia held that Winston had failed to demonstrate deficient performance and prejudice, and the district court held that this was not an unreasonable application of *Strickland*. We affirm because it was not unreasonable to conclude that there was no prejudice.

Because a verdict recommending death in Virginia must be unanimous, Va. Code Ann. § 19.2-264.4(E), the prejudice inquiry requires Winston to demonstrate that there was a reasonable probability that, but for his counsel's failures, a single juror would have voted against death. Each juror has discretion to vote for death provided that: (1) the prosecution proves one of Virginia's statutory aggravating factors beyond a reasonable doubt; and (2) the jury considers all the evidence in mitigation.

See Watkins v. Virginia, 229 Va. 469, 331 S.E.2d 422, 437-38 (Va. 1985). Winston does not argue that either of these requirements was not satisfied. Accordingly, we consider whether the Supreme Court of Virginia unreasonably applied federal law when it concluded that no juror would have exercised his or her discretion to vote against death.

Winston argues that the Virginia Supreme Court unreasonably applied federal law because at least one juror would have exercised his or her discretion to vote against death if: (1) his trial counsel had elicited facts concerning his sub-average intellectual functioning through live witnesses rather than through the written psychological reports that were submitted to the jury; (2) the jury had seen Winston's 1997 psychological records and IQ score of 66; and (3) his trial counsel had presented a more detailed narrative of his traumatic childhood. In rejecting these arguments, the Virginia Supreme Court emphasized that Winston "does not identify the substance of any additional evidence he contends counsel should have presented and does not explain how such evidence would not have been cumulative." J.A. 306; *accord id.* at 308.

In rejecting Winston's first argument about the need for live witnesses on the issue of low functioning intelligence, the Virginia Supreme Court rested its determination primarily on the rich content of the written psychological reports. The reports contained many assessments easily understood by the lay juror, including findings that Winston was of "mentally

deficient to average intelligence" with "extreme problems maintaining attention and effort" and "many emotional concerns resulting from his abandonment and rejection from various family members." *Id.* at 306. Hence, the core of Winston's mitigation case was before the jury. Also, Winston had not shown that any particular testimony would have materially added to the reports.

Winston responds by arguing that the manner rather than the substance of counsel's mitigation case is the critical factor. He argues that the district court "treats manner of presentation as a complete irrelevancy." Appellant's Br. at 77. Winston does not, however, cite any case law in this circuit to support his argument. Moreover, what case law Winston does cite does not stand for the proposition that ineffective assistance follows from a failure to present evidence through live witnesses. *See, e.g., Gray v. Branker,* 529 F.3d 220, 234-38 (4th Cir. 2008) (prejudice found when counsel offered no medical explanation for defendant's behavior); *Williams v. Allen,* 542 F.3d 1326, 1342 (11th Cir. 2008) (prejudice found when counsel failed to discover evidence that "paint[ed] a vastly different picture" than that presented to the jury). While we acknowledge that there might be a case when the manner in which counsel presents evidence is so abysmal that it supports a finding of prejudice, the line would have to be drawn carefully so as not to conflate deficient performance with prejudice. We simply cannot conclude in this case that the Virginia Supreme Court unreasonably

applied federal law by discounting the manner in which counsel presented mitigation evidence.

Winston's second argument – based on counsel's failure to introduce his 1997 psychological records and I.Q. score – does not survive a careful comparison of the psychological records the jury did see and the records it did not. Winston's 1997 psychological evaluation reads very much like his previous evaluations. Both his 1995 and 1997 evaluations agree that Winston was "cooperative" but very "immature." J.A. 1917, 1979. Where Winston largely disclaims responsibility for his own bad acts in the 1995 evaluation, he "reports that he does not feel guilty after doing something wrong" in the 1997 evaluation. J.A. 1919, 1981. With regard to I.Q. scores, his verbal I.Q. for both the 1995 and 1997 evaluations was consistent at 60, which both evaluations describe as being within the range of "mild mental retardation". J.A. 1918, 1980. His performance I.Q. scores on his 1987 and 1990 tests were actually lower than his score on the 1997 test, and his 1990 and 1997 evaluations both describe his nonverbal skills as "borderline." J.A. 1913, 1980. Finally, each of the evaluations describes his intellectual functioning at various points as "limited", "borderline", or "mentally deficient." J.A. 1910, 1915, 1921, 1982.

Despite these similarities between what was introduced and what was not, Winston argues that "the information possessed by the jury was tremendously incomplete." Appellant's Br. at 77. The

question, of course, is whether the information possessed by the jury was materially incomplete. Although the jury did lack certain details, Winston cannot suggest prospects for the material omission category except for the single one-page document in which Fairfax County changed his primary disability classification to "mild retardation", J.A. 1876, and the 1997 I.Q. score of 66. While Winston's classification and 1997 I.Q. score are material to his *Atkins* claim, there is no reason to believe that these items would have been persuasive to the jury as ordinary mitigating evidence. With all of the similarities between the submitted and unsubmitted evaluations described above, the question is whether the classification and the additional low score would have made a difference. Because the reports before the jury had already classified Winston's verbal abilities as mildly retarded, we cannot conclude that a more general classification of mild retardation would have made a material difference. Similarly, we cannot conclude that the difference between a score of 73 and 66, while perhaps critical to a finding of mental retardation under *Atkins*, would have made a material difference to a lay juror considering a broader range of mitigation evidence about intellectual functioning.

The dissent contends that the jury did not possess at least ten items of material information. In most of the instances cited, however, the jury either had the information or had information that was essentially indistinguishable. Items 3 (deficient

verbal skills) and 5 (twice failing kindergarten) cited in the dissent were noted in Winston's 1995 and 1987 evaluations. J.A. 1909, 1918. Items 4, and 6-10 all comment on various specific deficiencies, some of which were discussed in the other evaluations, J.A. 1920-21 (items 7 and 9 – failure to understand social expectations or properly handle money), while others such as item 4 (evenly delayed functioning in all areas) are merely syntheses of previous observations. This again leaves only Fairfax County's retardation classification and the 1997 I.Q. score, and, as explained above, these omissions were not material.

Winston's third and final argument – that his trial counsel did not adequately present the jury with evidence of his traumatic childhood – also fails. Defense counsel called four witnesses to illustrate his traumatic childhood: a social worker who testified as to his itinerant experience in foster care; and his mother, grandmother, and great-grandmother, who testified as to his poor upbringing and his exposure to drugs and crime at a very young age. While we have no doubt that Winston's counsel could have painted a more detailed picture of his childhood, we cannot conclude that the picture they did paint was somehow materially incomplete. Winston's argument appears to be that further embellishments, greater detail, and more forceful advocacy would have changed at least one juror's mind. He does not argue, however, that the mitigation case or traumatic childhood his counsel did present to the jury was misleading or that it left out critical facts. *Cf. Williams,* 542 F.3d at

1342-43 (finding prejudice when counsel put on testimony describing defendant's childhood beatings as "ordinary parental discipline" that occurred occasionally, rather than testimony describing the beatings as "serious assaults" involving "deadly weapons" that occurred "on a near constant basis"). The jury heard testimony concerning Winston's abandonment by a drug-abusing mother and his exposure to criminal life by his grandmother. It also saw documentary evidence describing his many difficulties coping with his sub-average intellectual functioning. Because the jury still recommended death in light of this evidence, we cannot conclude that the Supreme Court of Virginia unreasonably applied *Strickland* when it held that a more detailed mitigation case would not have changed even a single juror's mind.

In reaching a contrary conclusion, the dissent gives inadequate consideration to AEDPA's standard of review. The dissent does argue that it "can find no reasonable theory under which the evidence disregarded could be considered cumulative," *infra* at 61, because Winston's counsel left out "even the most basic details of Winston's childhood," *infra* at 63. As we explained above, however, we do think that such a reasonable theory existed and that counsel did present the basic details of Winston's admittedly troubled childhood to the jury. Again, the Virginia Supreme Court may have been wrong to adopt such a theory, but we cannot conclude that it acted unreasonably.

In summary, even if we assume deficient performance by Winston's counsel, we conclude that the Supreme Court of Virginia did not unreasonably apply federal law when it held that counsel's performance did not prejudice Winston's case in mitigation.

IV.

For the foregoing reasons we affirm the district court's denial of Winston's claims except with respect to his *Atkins* and *Atkins-related* ineffective assistance claims. With respect to the *Atkins* and *Atkins-related* claims, we vacate the district court's decision and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

CONCUR BY: GREGORY (In Part)

DISSENT BY: GREGORY (In Part)

DISSENT

GREGORY, Circuit Judge, concurring in part and dissenting in part.

Today's decision overlooks the prejudice that Leon Jermain Winston suffered from the utter failure of counsel to investigate and present mitigating

evidence at the penalty phase where he received a capital sentence. If we are to safeguard the Sixth Amendment right to effective assistance of counsel in criminal cases, then we must conduct a meaningful review of the record when, as here, there is a vast quantity of unquestionably mitigating evidence that was never presented to the jury. Moreover, while it appears that Winston failed to raise the issue in his state habeas petition, I disagree with the majority's merits-inquiry denying Winston's claim that his due process rights were violated by the state court's refusal to instruct the jury on lesser included homicide charges. The majority misinterprets the evidence at trial by equating evidence placing Winston at the scene with evidence that Winston was the triggerman. Only the latter satisfies Virginia's requirement for a capital conviction. Therefore, I respectfully dissent from the portions of this opinion denying those two claims, but I concur in the majority's judgment as to the remaining issues.

I.

In section II.B, the majority concludes that Winston's due process rights were not violated when the state court denied his request for instructions on lesser included homicide charges. I agree that Winston did not raise this issue in his state habeas petition. Because the majority proceeds to reach the merits and because the Commonwealth did not raise the issue of exhaustion in the district court or before

this Court, I note my disagreement with the majority's assessment.

The merits inquiry is guided by the Supreme Court's decision in *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). In *Beck*, the Court announced the principle that

> capital defendants have a constitutional right to receive a jury instruction on a lesser-included offense "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense."

Hyatt v. Branker, 569 F.3d 162, 174 (4th Cir. 2009) (quoting *Beck*, 447 U.S. at 637); *Bates v. Lee*, 308 F.3d 411, 420 (4th Cir. 2002). The Court concluded that finding otherwise would "enhance the risk of an unwarranted conviction." *Beck*, 447 U.S. at 637.

The Supreme Court subsequently explained that "due process requires that a lesser included offense instruction be given *only* when the evidence warrants" it. *Hopper v. Evans*, 456 U.S. 605, 611, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982). I agree with the majority that Virginia's rule poses no constitutional problem because it is consistent with the federal rule and that the application of the two rules is identical. What the majority fails to appreciate is that this Court has found that whether the evidence warrants the instruction is *not* a sufficiency of the evidence

question. *See Hyatt*, 569 F.3d at 174. Instead, "*Beck* requires a lesser-included offense instruction when the evidence at trial merely casts 'some doubt' on a *necessary element* of the capital charge." *Id.*; *cf. Taylor v. Workman*, 554 F.3d 879, 887 (10th Cir. 2009) (finding that *Beck* clearly holds that courts are not to determine which instruction they feel is most warranted but instead must give the lesser included offense instruction in every case where the evidence supports it).

Under Virginia law, the "element that would justify conviction of a capital offense," *Beck*, 447 U.S. at 637, in this case is that Winston is a principal in the first degree. *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267, 280 (Va. 1986). Winston argues that because there was evidence that he was not the triggerman, and therefore not a principal in the first degree, he was constitutionally entitled to lesser included offense instructions on non-capital murder. The majority today agrees with the Supreme Court of Virginia that there was "overwhelming evidence . . . that Winston was the triggerman responsible for Rhonda's death." *Winston v. Commonwealth*, 268 Va. 564, 604 S.E.2d 21, 44 (Va. 2004). When a state court has decided whether a lesser included offense instruction is necessary, this Court has unmistakably affirmed that federal court review in the habeas context is limited by the Antiterrorism and Effective Death Penalty Act of 1996. *See Hyatt*, 569 F.3d at 166.

Even given this deferential standard, I find the state court's determination of the facts to be unreasonable.[1]

Evidence at trial supported Winston's requested instructions for lesser included homicide charges and his theory that he was present at the scene but was not the triggerman, casting "some doubt" on one element necessary for his capital conviction. Niesha Whitehead, the *only eye witness*, testified on direct and cross to facts showing Winston was not the triggerman. In fact, Niesha, the government's witness, did not identify Winston. On the stand, Niesha testified that it was the man wearing all black

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[1] Contrary to the majority's assertion, the state court's determination that there was "overwhelming evidence" pointing to Winston as the triggerman is not exclusively a legal determination. *Supra* at 16. The state court correctly identified the applicable law to resolve this issue. However, the court's reading of the facts is what I find not only incorrect but also unreasonable.

If the majority does read the court's statement as a legal determination, then the state court engaged in an unreasonable application of clearly established federal law. "Under *Beck*, courts are not directed to evaluate the evidence to determine whether it would support a first degree murder conviction, or even whether a conviction for first degree murder or a lesser-included offense is better supported." *Taylor*, 554 F.3d at 887. Rather, "[t]he proper inquiry is whether the defendant presented sufficient evidence to 'allow a jury to rationally conclude' that the defendant was guilty of the lesser-included offense." *Id.* at 888 (citation omitted). Thus, if, as the majority suggests, the state court determined that the lesser included offense instruction was not warranted "in light of" the evidence supporting the capital murder charge, it unreasonably applied *Beck*.

that shot her mother. J.A. 37, 45-46. She also testified that the other man was wearing stripes and tried to stop the shooter. J.A. 45. Unrebutted evidence existed that Winston was wearing stripes. *Winston,* 604 S.E.2d at 44. Contrary to the majority's contention, Niesha's testimony was not inconsistent concerning the clothing of the two men. When first asked what the shooter was wearing, Niesha responded, "All black." J.A. 36. At that time, on direct, she stated that she could not recall whether the clothing had stripes in it. J.A. 37. Throughout the rest of her testimony, Niesha stated that there was one man in "all black" and one wearing stripes. J.A. 42, 44, 46-48. She testified that it was the man in "all black" that pulled the trigger. J.A. 44-46.

Niesha also testified that the shooter was taller than her father, Anthony Robinson. J.A. 48-49. Winston was shorter than Robinson. J.A. 216, 222. The majority relies on Niesha's testimony that a man with a tattoo was the shooter. However, Niesha was shaky on which man in the house had a tattoo, testifying both that it was the shooter *and* the non-shooter. J.A. 38-39, 47-48. Thus, that Winston had a tattoo is not determinative of which person was the triggerman.[2]

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[2] Other than which person at the scene had a tattoo, Niesha's testimony was consistent with the fact that Winston was *not* the triggerman.

The majority finds that I am not "troubled" by the weaknesses in Niesha's testimony. *Supra* at 15. However, the fact that Niesha's testimony is inconsistent on which man had a tattoo does not signify that it lends no support to Winston's requested instructions. In fact, the main inconsistency in Niesha's testimony, which person had the tattoo, undermines the majority's position, not Winston's. If Niesha's testimony were truly undermined as a whole, as the majority suggests, *supra* at 15-16, it seems unusual that the majority cites to her testimony in support of its position. Thus, given the dearth of evidence directly proving that Winston was the triggerman, Niesha's testimony cast some doubt on an element necessary for Winston's capital conviction.[3]

Other than the testimony of Rorls, whose credibility was questioned at trial, no evidence relied on by the majority can be characterized as "overwhelming" evidence that Winston was the triggerman on April 19, 2002.[4] The majority cites to

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[3] Niesha's testimony was not the type of self-serving testimony of a criminal defendant or of an incredible witness with a bias towards the defendant. Her testimony in favor of Winston was first elicited by the Commonwealth.

[4] Contrary to the majority's assertion, I do not minimize the significance of relevant evidence. In fact, it is not our job to weigh the evidence or search for evidence to support the instruction given. While I recognize that there is evidence in support of the jury's verdict, this is not a sufficiency of the evidence issue. The question is whether the evidence at trial cast some doubt that Winston was the triggerman – whether the

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evidence that only places Winston at the scene, which is insufficient for a capital conviction under Virginia law. While there was testimony that Winston's DNA was on the gun used, this does not prove that Winston pulled the trigger on the date in question.[5] For example, Winston could have supplied the gun or he could have simply hidden the gun after the shootings to cover up his complicity. Neither of these scenarios would have made Winston death-eligible. Additionally, Niesha testified that both men were wearing gloves. J.A. 42.

Because the evidence in this case casts *some* doubt that Winston was the triggerman, an element necessary for conviction of the capital offense in Virginia, Winston was entitled to an instruction on the lesser included homicide charges. Some doubt is all that is required. In finding that there was "overwhelming evidence . . . that Winston was the triggerman responsible for Rhonda's death," *Winston*, 604 S.E.2d at 44, the state court made an unreasonable determination of the facts.

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state court made an unreasonable determination of the facts in finding that the evidence that Winston was the triggerman was "overwhelming."

[5] The majority cannot simply draw "inferences" in only one direction. *Supra* at 16. Again, this is not a sufficiency of the evidence issue.

II.

In section III.B, the majority inadequately considers Winston's claim that his counsel was constitutionally ineffective by not reading relevant records in his possession, passing along four incomplete psychological reports to jurors without explanation, failing to mention Winston's classification as mentally retarded, failing to present evidence of Winston's adaptive deficits and cognitive difficulties, and presenting extraordinarily minimal, mitigating evidence about Winston's childhood in a generalized and unpersuasive manner given the reasonably accessible material available. Rather, the majority puts forth alleged arguments made by Winston that fail to represent his entire claim. Looking at the whole record and Winston's complete argument, I must depart from the majority and find that the state court was unreasonable in dismissing Winston's claim that he received ineffective assistance of counsel at the sentencing phase of his trial.

A.

In this case, the performance prong of *Strickland* entails assessing whether counsel satisfied his duty to consider and investigate mitigating evidence for sentencing in a capital case. It is a "well-defined norm [ ]" that "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence.'" *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S. Ct. 2527,

156 L. Ed. 2d 471 (2003) (quoting American Bar Association ("ABA"), *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.4.1(C) 93 (1989) (hereinafter *Guidelines*)). According to the ABA Guidelines in effect at the time, counsel had a duty to consider presenting medical evidence, educational history, and family and social history, especially in a capital case. *Guidelines* 11.8.6. Counsel plainly cannot perform this duty when not reasonably informed about the case.

Although courts cannot second-guess the strategic choices of counsel, counsel must be informed to act strategically. *See, e.g., Rompilla v. Beard,* 545 U.S. 374, 389-90, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (concluding a decision not to pursue certain mitigating evidence cannot be strategic if it is based on inadequate investigation); *Wiggins,* 539 U.S. at 527-28 (finding a cursory investigation insufficient to support any tactical decision). Here, counsel was in no way informed. Counsel testified he had *no strategic reason* for not pursuing further mitigating evidence. J.A. 656, 674-75, 677, 681. Furthermore, counsel failed to read records in counsel's possession and made no reasonable effort to discover mitigating evidence that was unmistakably available. While Winston's counsel had the assistance of an investigator, no mitigation investigation occurred nor was a mitigation specialist provided. Instead of reviewing the records regarding Winston's case in his very possession, counsel abdicated his

constitutional duty by relying on Dr. Nelson, who had been appointed to evaluate Winston, to review them.

When analyzing whether counsel's deficient performance was cause for the procedural default of Winston's *Atkins* claim, the district court correctly recognized that "capital trial counsel cannot outsource their fundamental responsibilities." *Winston v. Kelly*, 600 F. Supp. 2d 717, 732 n.14 (W.D. Va. 2009). The court added that "[a]lthough counsel's 'strategic choices made after thorough investigation . . . are virtually unchallengeable,' [*Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], contextually, simply not reading essential documents that are facially significant to competent capital defense counsel did not seem to this court to be any choice at all." *Id.* at 732. The court inexplicably and inappropriately failed to apply this logic when deciding whether the *same counsel* was ineffective in failing to investigate and present mitigating evidence. *See Winston v. Kelly*, 624 F. Supp. 2d 478, 512 (W.D. Va. 2008).

While the Supreme Court has recognized that "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up," the Court has also found failure to review relevant files that are easily accessible can be objectively unreasonable and that reasonable counsel would investigate further in the absence of "good reason to think further investigation would be a waste." *Rompilla*, 545 U.S. at 382-83, 389-90. Without reading the records, counsel had no

strategic reason to think further investigation was unnecessary. Additionally, unreasonableness can be heightened by the easy availability of the mitigating evidence. *See id.* at 389-90. Here, counsel had the documents in his possession containing mitigating evidence and leads to easily-located evidence. Even a cursory review of this record shows that the district court erred when it held that the state court was reasonable in finding that counsel's limited efforts at sentencing were not deficient.

B.

On the second prong of *Strickland,* the state court unreasonably determined that Winston was not prejudiced by counsel's deficient performance. A thorough review of the record demonstrates that but for counsel's deficient conduct, a reasonable probability exists that at least one juror would have voted against the death penalty. At sentencing, counsel presented a few witnesses, asked them yes or no questions spanning less than thirteen transcript pages, threw several incomplete psychological evaluations at the jury without explanation or context, and hoped for the best. The minimal evidence counsel *did* present is at stark contrast with the mountain of mitigating evidence that was readily available, including evidence of mental deficiencies and evidence of Winston's emotional distress, neglect, and abandonment throughout childhood.

Setting aside whether Winston satisfies the Virginia definition of mental retardation,[6] evidence of mental deficiencies is certainly mitigating. Counsel here indisputably failed to present to the jury a *classification of Winston as mentally* retarded that was in counsel's possession. The majority apparently finds this harmless, reasoning that "there is no reason to believe that these items [the classification of mental retardation and 1997 I.Q. score of sixty-six] would have been persuasive to the jury as ordinary mitigating evidence." *Supra* at 39. This assertion misses the mark, and despite the majority labeling the classification a "single one-page document," *supra* at 39, it is the only classification of Winston as mentally retarded that existed and was thus supremely relevant to assessing mitigating evidence. While a specific score may or may not be influential to a lay juror,[7] a *classification* as mentally retarded

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[6] Based on the evidence before this Court, Winston has a strong claim that he is mentally retarded under Virginia law and that the default of that claim should be excused based on cause and prejudice resulting from ineffective assistance of counsel. I therefore fully concur with our decision today to remand this case to the district court so that it may properly consider evidence that came to light at the evidentiary hearing.

[7] The majority cites to several of Winston's verbal I.Q. scores as evidence before the jury of Winston's deficient verbal abilities. If these scores are material to the jury's evaluation, then surely the same must be said of an overall I.Q. score of sixty-six, lower than all the overall I.Q. scores contained in the reports handed over to the jury. And if the majority assumes the jury could interpret the verbal I.Q. scores and classifications, by the same token we should assume the jury understands that a

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certainly would have been *materially* significant to the jury when considering evidence about Winston's subaverage intellectual functioning. The majority finds the classification immaterial by characterizing it as "more general" than the classifications of Winston's verbal abilities that the majority assumes the jury read and could correctly interpret. *Supra* at 39-40. However, the 1997 evaluation in pertinent part states that

> Leon earned a Verbal IQ score of 60 and a performance IQ score of 77, resulting in a Full Scale IQ score of 66. Based on his Full Scale score, Leon is currently functioning in the Mentally Deficient range of intelligence, and might be expected to achieve better than one percent of his age group in academic areas.

J.A. 1980. Thus, it is clear that a juror reading such evaluation would place more importance on a full scale classification and score than that of a sub-part. It is the full scale score that is used to classify a person as mentally retarded.

Beyond the failure to present the classification, counsel did not provide the jury with information from certain teachers, social workers, and family members whose input would have been essential to evaluate Winston's mental state and adaptive

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full scale I.Q. score is the score used to classify a person as mentally retarded.

functioning. The majority concludes that Winston is asserting that his counsel was constitutionally inadequate purely because live witnesses did not present the information. *Supra* at 37-38. This conclusion is incorrect. Winston's argument is that the information was not presented *at all* because (1) counsel's investigation was unreasonably wanting, Petr.'s Br. 78, and (2) "the information possessed by the jury was tremendously incomplete," *id.* at 77. It is undisputed that, as discussed above, counsel did not read records in his possession nor conduct a full investigation.

As for information regarding Winston's low intellectual functioning, the majority relies heavily on the psychological reports entered into evidence. The majority finds that the reports contained "rich content" "describing [Winston's] many difficulties coping with his sub-average intellectual functioning." *Supra* at 37, 41. However, to clarify, the evaluations constantly referenced external documents,[8] and therefore, the jurors received incomplete information *even if* we assume that they read and understood the evaluations. Counsel presented Crystal Carper from the Fairfax County Department of Family Services to

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[8] Historical and detailed information about Winston was referenced in the documents, but not provided. As an example, the 1995 evaluation states that "[d]etails of Leon's family life are available to the court, and so will not be reported here in great detail." J.A. 2075. The "details" referred to were never provided to the jury.

authenticate the evaluations. As Carpenter had *no personal knowledge of the evaluations,* she could not speak to their information, and the documents were merely entered into evidence. Simply sending incomplete records back with the jury without explanation or context does not save counsel's constitutionally deficient performance in this case. *See Johnson v. Bagley,* 544 F.3d 592, 602 (6th Cir. 2008) (finding that "an unreasonably truncated mitigation investigation is not cured simply because some steps were taken prior to the penalty-phase hearing and because some evidence was placed before the jury").

The information before the jury concerning Winston's sub-average intellectual and adaptive functioning was also materially incomplete because counsel failed to seek out those most familiar with Winston in these areas. If the jury had this information, there is a reasonable probability that at least one juror would have voted against the death penalty. That the state court found otherwise is unreasonable. As an example, two of the people that counsel did not speak with were Kirsten Jackson and Denise King. Jackson, Winston's aunt, who was three years his junior, was never contacted by counsel despite living with Winston for almost ten years until Winston was age seventeen. Among Jackson's testimony at the evidentiary hearing is the following:

> you could tell him to wash the dishes, and you would come back and the dishes weren't done, and he was just standing there

trying to figure out what he was supposed to be doing. Anything, any chore he was supposed to be doing, you had to constantly go back and remind him. . . .

. . . .

His hygiene was good when he lived with us because my mom constantly made sure he took a bath. . . . And afterwards, it was – when he moved out, it was something totally different. He always looked dirty, like just smelled nasty, just untouchable. You didn't want to touch him; that's how dirty he looked.

. . . .

I think my mom bathed him until he was about 10, 11. He had to be watched until he was about that age.

. . . .

. . . we had one incident where he fell asleep in the tub and had a bowel movement in the tub. And we were trying to figure out where he was at and what was going on. We went upstairs, and he told us it was just toys, and he started playing with it.

. . . .

You couldn't have a conversation with him. He couldn't comprehend what everyone was saying. Talking to him was talking on a different level. It was like you were talking to someone like – that was five or six years old, that he constantly was – like he would

> joke at the wrong times, or he could – if he couldn't comprehend, like, or have the conversation that we were having, he would like sort of mimic what everyone was saying and converse in that way, and just – it was impossible.
>
> . . . .
>
> His idea of friendship was if he did something for them, that that was his way of getting them to like him[.]
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> . . . .
>
> He was never able to do his homework. Things that his teacher would send him home with, he couldn't comprehend it, he didn't understand it. Even if it was told to him how to do it at school, he would still come home and couldn't figure it out, and I would have to explain to him what the teacher meant and what he was supposed to be doing. And he would generally get frustrated, agitated, and get upset, want to fight just because he didn't know it. Just spelling and all of that, he didn't have a good subject in school.

J.A. 725-31.

Denise King was Winston's teacher for four years at the Leary School, a school of last resort for students in Fairfax County who were experiencing learning and behavior difficulties. King spent on average seven hours a day with Winston, then age eight, and yet she was never contacted. At the

evidentiary hearing, she testified that Winston had great difficulty reading and following directions. Among King's testimony about Winston at the hearing is the following:

> He posed a particular dilemma to me because I thought I came equipped to help students with special needs, and I could not teach Leon to read; he was a particularly difficult student to teach. . . .
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> . . . .
>
> I always felt like Leon was not very well cared for. He was interested in school, but I think he had a lot of things going on at home. . . . I think even his physical needs weren't taken care of. His clothes didn't seem to be his own; they appeared too big for him. And we didn't have a lunch program at the school, and Leon didn't come with food.
>
> . . . .
>
> I think he had auditory processing problems. He didn't understand a lot of what he heard. If it was more than one or two directions, he had trouble following it. He misinterpreted social cues. He misinterpreted what people said. He took things very literally. I think his abstract reasoning and long-term memory were probably very limited as well.
>
> . . . .
>
> Leon was the lowest student for the whole four years that I had him. . . .

. . . .

I don't think he knew what a reciprocal friendship was like. A friend was somebody who was, if you were hungry, would give you a cookie, or if you were thirsty, would give you a soda. But other than that, I don't think that he even understood what friendships and that kind of thing were all about.

. . . .

He had no real sense of time. You know, it's dark outside or it's light outside, but other than that, not really.

. . . .

And Leon did not have any idea where the school was in reference to where he lived. . . . And he wouldn't leave early because he didn't know how to get home.

. . . .

I saw very small changes in his academics. . . . There are students that, yes, would adapt to the situation, and once they got into sort of the groove of how the school goes, that's when they catch on and they really start to learn. That was not the case with Leon. He never got it. He never understood how school went and how – it was every day was a new day, every day.

J.A. 741-54.

In addition to testimony from Kirsten Jackson and Denise King, other evidence of mental

deficiencies *not presented* due to counsel's failures includes the following:

> 1. Fairfax schools classified Winston as mentally retarded in 1997, as mentioned above, J.A. 1876;
>
> 2. The 1997 classification, as well as other documents in counsel's possession, identified Marilynn Schneider Lageman ("Lageman") as a psychologist and a member of the Special Education committee that recommended the 1997 evaluation. Winston produced a 1997 evaluation by Lageman conducted on Winston, which included a verbal I.Q. score of sixty and a full-scale I.Q. score of sixty-six. This full-scale score is more than two standard deviations below the mean, compelling evidence of mental retardation under the Virginia definition. Lageman was never contacted, J.A. 1232, 1876;
>
> 3. By 1997, sixteen year-old Winston demonstrated "verbal cognitive skill development within the mild range of mental retardation for his age," J.A. 1980;
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> 4. Winston's 1997 "evaluation [showed] a fairly evenly delayed profile of cognitive, social, and emotional functioning, generally within the mild range of mental retardation," J.A. 1982;
>
> 5. Winston failed kindergarten twice and had severe academic struggles, J.A. 1909;

6. By age fourteen-and-a-half, Winston had not developed age-appropriate ability to tell time or learn the months of the year, J.A. 751-52;

7. Lageman noted "[i]t [was] particularly surprising how little Leon appear[ed] to understand social expectations and the reasons behind social practices." J.A. 1980;

8. After being placed in the custody of Fairfax County, Winston "had extremely low intellectual functioning" and experienced severe emotional distress, J.A. 1359, 1799;

9. Winston's handling of money was "inadequate by almost any standard" and he "never had a checking account, a savings account, a credit card, an apartment/home lease or ownership in his name," J.A. 1257;

10. Winston never had a job of any type other than selling drugs on the street; even at this, other persons gave him instructions and the drugs in pre-divided quantities with set prices, J.A. 896-97, 1258.[9]

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[9] Despite the majority's herculean efforts to comb the record and find some of the facts listed buried in the reports entered into evidence, *supra* at 40, the jury found *no* mitigating factor. Thus, we cannot ascertain whether the jury glanced at the reports, much less considered the reports in depth as the majority has. The jury was given little reason to read the reports. The reports were given no context or explanation. Not one witness spoke personally to any of the information contained in the reports. Furthermore, as mentioned previously, the reports were materially incomplete.

Additionally, because not reasonably informed, counsel failed to present consequential evidence of Winston's childhood of emotional distress, neglect, and abandonment, including the following:

> 1. Winston's mother could not stand to be around him and was violent with her children, J.A. 429;
>
> 2. The "void left by his mother's absence was never filled, and the negative influence(s) of her criminal activity were never replaced with positive ones," J.A. 1358;
>
> 3. While the jury did hear that Winston's grandmother ran a shoplifting operation, it did not hear that it was Winston who blew the whistle on the operation when he was picked up by Fairfax County Juvenile Detention after his family left him behind and fled as the operation was busted, J.A. 1352;
>
> 4. Because Winston had *no* real caretaker in his life, he "was denied a real feeling of family and belonging," J.A. 1358;
>
> 5. At age fifteen, Winston was "struggling significantly with trust versus mistrust issues due to all the abandonment and loss in his lifetime." J.A. 72;
>
> 6. At the Leary School, Winston was "struggling to make sense out of the world" because of his abandonment and upbringing, J.A. 1345;

7. A teacher at Leary noticed that "Leon's concept of right and wrong never stood a chance," J.A. 1347;

8. Winston was easily manipulated, had few or no friends, and was never fully accepted by any peer group, J.A. 1347, 1370;

9. Winston was consistently described by family, counselors, and teachers as a child characterized by gullibility, immaturity, passiveness, a lack of self-esteem, and a desperate need for peer acceptance, J.A. 1255-56;

10. Winston was diagnosed with Fetal Alcohol Syndrome, J.A. 1271.

In spite of all the above evidence *not presented to the jury,* the state court found no prejudice on the ground that the evidence was cumulative. I can find no reasonable theory under which the evidence disregarded could be considered cumulative.

The negligible evidence of Winston's childhood that was before the jury gave an "incomplete and misleading understanding of [Winston's] life history." *Williams v. Allen,* 542 F.3d 1326, 1331, 1340 (11th Cir. 2008). As I found previously, the evaluations were both unexplained and incomplete. Also, counsel presented three witnesses to speak solely on Winston's social history: his mother, grandmother, and great grandmother. In totality, these witnesses represent less than thirteen transcript pages and provided only vague generalities about Winston's

upbringing, generally through yes or no answers. Consider an excerpt from Winston's mother's testimony at sentencing:

> Q. And how old was he when you went to the penitentiary?
>
> A. Six and a half.
>
> Q. Okay. And what are you in the penitentiary for?
>
> A. Malicious wounding, firearm and robbery.
>
> . . . .
>
> Q. Was Leon with you when that crime was committed?
>
> A. Yes, sir.
>
> . . . .
>
> Q. Has Leon's father ever been involved in his life?
>
> A. No, sir.
>
> . . . .
>
> Q. When you became pregnant with Leon, what were some of your habits?
>
> A. You mean as –
>
> Q. Well, did you stick strictly to drinking tea and milk and things like that or did you drink something else?
>
> A. Alcohol. I did drugs.

J.A. 240-41. When contrasting the one- or two-word answers by three witnesses with the mitigating evidence available, the state court unreasonably determined that but for counsel's deficient conduct, a reasonable probability did not exist that at least one juror would have voted against the death penalty. For example, Winston's mother never described him as a child, never told a story of him growing up, nor provided any examples to humanize him. Astoundingly, she was never asked to. This dearth of even the most basic details of Winston's childhood[10] stands in stark contrast to his mother's affidavit, submitted *two years later*:

> I was 15 years old when I got pregnant with Leon. I was never in a relationship with his father, Leon Johnson. I knew his father because he was a junkie and I was doing a lot of drugs and drinking at the time. When Leon Johnson found out that I was pregnant, he denied that it was his baby. I have never seen him since then.
>
> I remember that it took Leon a long time to learn how to use the toilet by himself. After he stopped using diapers, he used to wet the bed a lot as a child. He also had

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[10] The majority finds that "counsel did present the basic details of Winston's admittedly troubled childhood to the jury." *Supra* at 41. It is difficult to imagine a capital case in which less testimony at sentencing was presented by defense counsel. The thirteen transcript pages relied on by the majority is bereft of anything approaching the meaning of "details."

problems talking – he stuttered a lot. Leon had a really hard time understanding directions I would give him. For instance, I remember that I would often ask him to get me "the chair," and I would point toward the chair that we kept next to the refrigerator in the kitchen. He did not seem to understand what I was talking about; he would just look back at me and say, "which chair," even though it was the only chair in the kitchen and the same chair I always wanted him to get for me. . . .

. . . .

I continued to drink and use drugs after Leon was born and during and after I was pregnant with my other two sons. During the times that I was living with my children, I would drive them to school. After I dropped them off at school, I would go to the liquor store when it opened at 10:00 a.m. I would buy a pint of Barcardi rum and go to my friends' house and drink it during the day. Sometimes I would finish it by the time I went to pick up the kids, and sometimes I wouldn't. I would usually go get some food at Burger King or McDonalds to try to bring down my high around the time I picked up my kids. I was also using still using [sic] drugs when the kids were in school. . . .

Leon started school before I went to prison. On some days, I was sober enough in the afternoon to try and help Leon with his homework. He had a really hard time with it,

> and I always thought that he was going to have problems learning. Leon had these ABC blocks, but he could never manage to put them in the right order. . . .
>
> There were times when we lived with my family members and times when we lived with my boyfriends. We moved around a lot. . . . I often left Leon with my family so that I could go hang out with my friends and get drunk and high.
>
> . . . .
>
> When I was dating Raymond Jackson, Leon told me once that Raymond beat him when I wasn't around.
>
> . . . I saw marks and bruises on his back once. . . . I just wasn't much of a parent to my children. I did not give them the love and attention they deserved to have. Two of my three children are currently in prison.

J.A. 1361-62. The dramatic detail contained in this affidavit plainly was not presented to the jury. Rather, counsel's presentation about Winston's childhood was haphazard and woefully incomplete.

Given the evidence cited herein of Winston's mental deficiencies and traumatic childhood, coupled with the absence of evidence that Winston was the triggerman, there is a reasonable probability that at least one juror would have voted against the death

penalty.[11] As the Supreme Court found in *Rompilla*, 545 U.S. at 393 (citations omitted), the evidence now before this Court

> adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although . . . it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Winston's] culpability," and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.

III.

In this capital case, the performance of counsel was abysmally deficient. Had the jury been able to

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[11] To exacerbate this prejudice, the nature of the information not presented is exactly the type that jurors find persuasive. Evidence of a diminished mental capacity, along with evidence of a traumatic childhood is precisely the kind of evidence that reduces a defendant's moral culpability and provokes sympathy from the jury. This Court has found that evidence of mental deficiencies "can be persuasive mitigating evidence for jurors considering the death penalty, and this evidence can determine the outcome." *Gray v. Branker*, 529 F.3d 220, 235 (4th Cir. 2008); *cf. Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004) (finding that evidence of mental deficiencies "garners the most sympathy from jurors").

place Winston's troubled childhood and background, along with the evidence of his mental deficiencies, "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. Additionally, I would find that Winston was unconstitutionally denied lesser included homicide instructions. Accordingly, I would reverse the state court's adjudication of Winston's ineffective assistance of counsel claim and due process claim as unreasonable and remand for resentencing. On this basis, I dissent.

LEON JERMAIN WINSTON, Petitioner,

v.

LORETTA K. KELLY, Warden, Sussex I State Prison, Respondent.

Civil Action No. 7:07cv00364.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION

600 F. Supp. 2d 717; 2009 U.S. Dist. LEXIS 17172

March 6, 2009, Decided
March 6, 2009, Filed

COUNSEL: For Leon J. Winston, Petitioner: James Moreno, PRO HACE VICE, Jennifer L. Givens, LEAD ATTORNEYS, FEDERAL COMMUNITY DEFENDERS OFFICE CAPITAL HABEAS UNIT, PHILADELPHIA, PA, Matthew L. Engle, LEAD ATTORNEY, CHARLOTTESVILLE, VA.

For Loretta K. Kelly, Warden, Sussex I State Prison, Respondent: Matthew P. Dullaghan, Steven Andrew Witmer, LEAD ATTORNEYS, OFFICE OF THE ATTORNEY GENERAL, RICHMOND, VA.

JUDGES: Samuel G. Wilson, United States District Judge.

OPINION BY: Samuel G. Wilson

OPINION

MEMORANDUM OPINION

A jury in the Circuit Court for the City of Lynchburg, Virginia found Petitioner Leon Jermain

Winston guilty of three counts of capital murder and sentenced him to three death sentences. After exhausting his state court remedies, Winston filed a habeas petition in this court pursuant to 28 U.S.C. § 2254 claiming actual innocence and raising more than thirty other claims. This court rejected all but two of these claims: the claim that because he is mentally retarded, *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), bars his execution, and the claim that he received ineffective assistance of counsel because his lawyers failed to prepare and present that claim to the jury. *Winston v. Kelly,* No. 7:07cv-00364, 2008 U.S. Dist. LEXIS 42565, 2008 WL 2234587, at *29 (W.D. Va. May 30, 2008). The Supreme Court of Virginia rejected Winston's mental retardation claim because he procedurally defaulted it, and rejected his related ineffective assistance claim because Winston failed to show that counsel's performance was deficient and failed to show that he suffered any resulting prejudice under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Winston v. Warden,* No. 052501, ___ S.E.2d ___, 2007 Va. LEXIS 4, 2007 WL 678266, at *15-16 (Va. Mar. 7, 2007). This court exercised its perceived discretion to hold an evidentiary hearing to resolve those interrelated claims.

At that hearing, Winston presented new evidence, including an IQ score of 66 that he received as part of a psychological exam in 1997. Since this new IQ score fundamentally alters Winston's ineffective assistance

claim and he cannot account for his failure to present it to the Supreme Court of Virginia, this evidence renders that claim unexhausted and procedurally defaulted. The court therefore reviews the new evidence to determine whether Winston is "actually innocent of the death penalty" so as to excuse his procedural default, and concludes that he cannot make the stringent showing actual innocence requires. Accordingly, the court is constrained to consider Winston's ineffective assistance claim as it was fairly positioned before the Supreme Court of Virginia, not as he attempts to reposition it here. Examining Winston's claim in light of the record presented to the Supreme Court of Virginia, the court finds that the Supreme Court of Virginia's adjudication on the merits of Winston's ineffective assistance claim, at least as to *Strickland*'s prejudice prong, was not unreasonable and finds nothing to excuse the procedural default of his *Atkins* claim. Accordingly, the court dismisses both claims and denies his petition for habeas corpus.

I.

The United States Supreme Court held in *Atkins* that the Eighth Amendment prohibits the execution of the mentally retarded, but tasked the states with developing "appropriate ways to enforce" that restriction. 536 U.S. at 317. Virginia law defines mental retardation as

> a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

Va. Code Ann. § 19.2-264.3:1.1(A) (2006). Defendants bear the burden of proving mental retardation by a preponderance of the evidence. *Id.* § 19.2-264.3:1.1(C).

The intellectual functioning prong is "demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean." *Id.* § 19.2-264.3:1.1(A). The Supreme Court of Virginia, consistent with the standards of the American Psychiatric Association, has determined a full-scale intelligence quotient ("IQ") score of 70 or less is the "standardized measure of intellectual functioning" that indicates mental retardation. *Johnson v. Commonwealth,* 267 Va. 53, 591 S.E.2d 47, 59 (Va. 2004), vacated on other grounds, 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 270 (2005). However, "a habeas petitioner is not required to submit an IQ score of 70 or less from a test taken before he turned the age of eighteen," but rather must prove only "that his intellectual functioning would have fallen below

this standard before he turned the age of eighteen." *Hedrick v. True*, 443 F.3d 342, 367 n.2 (4th Cir. 2006). Virginia law requires adaptive behavior assessments to be "based on multiple sources . . . including clinical interview, psychological testing and educational, correctional and vocational records," and at least one standardized, generally accepted measure of adaptive functioning. Va. Code. Ann. § 19.2-264.3:1.1(B)(2).

In Winston's capital murder trial, B. Leigh Drewry, Jr., one of two court-appointed lawyers, "accepted responsibility for gathering the mitigation evidence." (App. 337.) In carrying out that responsibility Drewry obtained Winston's "high school records, social service records, and hospital records." (App. 338.) Those records included three psychological evaluations, each accompanied by an intelligence test. (App. 1-2, 3-6, 11-15.) Winston took the first of these intelligence tests, the Wechsler Intelligence Scale for Children-Revised (WISC-R), in 1987 at age seven and received a verbal IQ score of 91, a performance IQ score of 67, and a full-scale IQ score of 77. (App. 1.) At that time he was judged to have "mentally deficient to average intelligence." (App. 2.) Winston took the WISC-R again in 1990 at age ten and received a verbal IQ score of 74, a performance IQ score of 75, and a full-scale IQ score of 73. (App. 3-4.) The evaluating psychologist noted that Winston was functioning in the "[b]orderline range of general intellectual ability," but believed that the test was an "underestimate" of Winston's abilities. (App. 4.) The psychologist also wrote, "[Winston's] ability to recall

specific verbal facts which are typically acquired through education and experience is extremely deficient and falls within the Mentally Retarded range (1st percentile)." (App. 5.) Winston took the third intelligence test, the Wechsler Intelligence Scale for Children-III (WISC-III), in 1995 at age fifteen and received a verbal IQ score of 60, a performance IQ score of 89, and a full-scale IQ score of 76. (App. 11-13.) The evaluating clinical psychologist attributed the precipitous decline in Winston's verbal IQ score to a "neurological insult" and found that he had "borderline intellect and severe verbal processing problems." (App. 14.) She noted that Winston's immaturity and passiveness "place him at a risk to be easily manipulated by others. He is likely to always follow the easiest path, the strongest leader. He is not likely to initiate activity, either good or bad, on his own." (App. 14-15.)

According to other records Drewry received, on October 10, 1996, the local screening committee of the Fairfax County Department of Student Services and Special Education ("Special Education Department") issued a report that recommended an additional psychological evaluation for Winston. (Pet'r's Ex. D at 843.) Three months later, on February 5, 1997, a Special Education Department committee determined Winston was eligible for special education due to "mild retardation" and that Winston "demonstrate[d] a reduced rate of intellectual development and a level of academic achievement below that of age peers" and

"concurrently demonstrate[d] deficits in adaptive behavior." (App. 69.)

At sentencing, Drewry did not attempt to prove that Winston was mentally retarded and therefore not subject to execution under *Atkins*. Instead, he attempted to shift the burden of proof to the Commonwealth, arguing that the Commonwealth was required to prove Winston was eligible for the death penalty by showing that he was *not* mentally retarded. Transcript of Jury Trial Proceedings before The Honorable Mosby G. Perrow, III on June 13, 2003 at 30-31, App. VII at 2937-38, *Winston v. Commonwealth*, 268 Va. 564, 604 S.E.2d 21 (Va. 2004) (Nos. 040686, 040687). The jury found Winston guilty of three counts of capital murder and imposed three death sentences. Winston's direct appeals were unsuccessful. *Winston v. Commonwealth*, 268 Va. 564, 604 S.E.2d 21 (Va. 2004), cert. denied, 546 U.S. 850, 126 S. Ct. 107, 163 L. Ed. 2d 120 (2005), reh'g denied, 546 U.S. 1056, 126 S. Ct. 720, 163 L. Ed. 2d 617 (2005). Winston then challenged his conviction and death sentence in a state habeas corpus petition raising more than thirty claims, including the claim that, because he is mentally retarded, *Atkins* bars his execution, and that his counsel were ineffective because they failed to investigate and make this argument at sentencing.

According to Drewry's own account in an affidavit filed in the state habeas proceedings and later in this court, Drewry did not notice or read the records relating to Winston's 1997 classification as mildly

retarded. Instead, he forwarded all the records to Dr. Evan Nelson, the clinical psychologist appointed to assist Winston in capital sentencing. Drewry claimed to have been unable to review all the records on his own and "relied on Dr. Nelson to thoroughly review the records and tell [him] what [he] needed to know." (App. 338.) Drewry considered his own failure to read these records significant. In his words:

> If I had noticed this record before trial, I certainly would have pointed it out to Dr. Nelson and followed-up on this information. I would have challenged his conclusion regarding mental retardation, particularly because the school record indicates [Winston] had adaptive deficits prior to age 18. This record would have been very valuable to us because it was documentation the *Commonwealth* diagnosed [Winston] with mental retardation as a child.

(App. 338-39.) According to Drewry's affidavit, "Dr. Nelson told [Drewey] he did not think [Drewery and his co-counsel, Glenn Berger] could prove [Winston] was mentally retarded as defined by the Virginia statute."[1] (App. 338-39.)

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[1] In his Capital Sentencing Evaluation on Motion of the Defense, Dr. Nelson noted that the issue of mental retardation would "naturally emerge" from the three IQ test scores known at that time. However, as he explained,

> the diagnosis of Mental Retardation requires low IQ *and* deficits in adaptive functioning. Typically, these deficits are reported by family and caregivers; the

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In support of the state habeas petition, Winston also filed records and affidavits purportedly chronicling his low-level intellectual functioning before age eighteen as well as concurrent, significant limitations in his adaptive behavior. Jean Tansey, Fairfax County's current Special Education Eligibility Specialist, explained in an affidavit that the school's 1997 mild retardation classification was likely based

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> standardized tests and procedures would not be fairly applied in this case for a variety of reasons. Even so, the undersigned interviewed multiple parent figures for this defendant and reviewed his school, court, and Department of Social Services records – and no sources ever described an overall pattern of deficits in adaptive functioning or slowness to reach developmental milestones. Nor did the defendant describe deficits: he ran a drug "business," managed his own finances, bought his own clothes, found places to live, knew how to drive and generally navigate, could do laundry but preferred to get others to do it for him, etc. What did become apparent were the many ways in which his personality development was damaged by his poor upbringing, and this was also the best explanation for the enormous variability in his IQ scores as charted above.

(Pet'r's Ex. H at 7-8.) Nelson also wrote that "Mr. Winston had a history of Borderline Intellectual Functioning as measured by *repeated IQ testings, but his daily living skills or real-world survival* were at least at that level." (Pet'r's Ex. H at 3.) Elsewhere in his report, Nelson noted that Winston "was able to summarize the gist of" an explanation of the purpose for Nelson's interview with him, and that "[t]he grades and testing from the available records documented academic failures and academic achievement well below his potential." (Pet'r's Ex. H at 2, 7.) Drewry did not call Dr. Nelson to testify at Winston's sentencing.

on a psychologist's assessment of cognitive ability and adaptive skills, but that these assessments were now destroyed:

> [i]t was the usual practice to perform updated psychological testing as well as an adaptive skills measure before classifying a student with mild retardation. It would be very unusual to classify a student as mildly retarded without first administering both a test of cognitive ability and an adaptive skills assessment. There is usually a psychologist on the eligibility team who is responsible for conducting this assessment. There was a psychologist on Leon Winston's team by the name of Diana Schwartz. Before a child could be classified as mildly retarded, the eligibility team would have to rule out other potential causes of the student's poor performance, such as chaotic home life, auditory or visual deficits, interrupted schooling, or other socioeconomic factors.
>
> . . . .
>
> On [habeas counsel's] request, I have searched our files for standardized testing of Leon Winston that would have been done in conjunction with this eligibility determination, as well as raw data from any such testing, and for adaptive skills assessments that would have been done, but I have been unable to locate these materials. I have checked with our storage facility and they do not have these materials. Such materials are typically destroyed after five

> years, and I can only conclude that those materials have been destroyed in this case.

50-Page Prophylactic Petition for Writ of Habeas Corpus at 36, *Winston*, 2007 Va. LEXIS 4, 2007 WL 678266 (quoting App. 32.) According to the Special Education Department's standard evaluation and eligibility criteria submitted with Tansey's affidavit, a child with an IQ above 70 could be considered mentally retarded for special education purposes because "[i]f all additional information is consistent with the [mental retardation] definition, a slightly higher IQ score may not be statistically significant." (App. 36.)

In addition to underscoring the 1997 determination that he was mildly retarded, Winston contended in his state habeas petition that when his 1987, 1990, and 1995 IQ scores were properly adjusted for both the Standard Error of Measurement (SEM)[2] and the

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[2] In his petition before the Virginia Supreme Court, Winston simply indicated that the court should apply "the generally accepted standard error of measure[ment] of plus or minus five points" to his earned IQ scores. 50-Page Prophylactic Petition for Writ of Habeas Corpus at 36, *Winston v. Warden*, 2007 Va. LEXIS 43, 2007 WL 678266.

As Winston's expert explained at the evidentiary hearing in federal court, an individual's score on a single IQ test is not necessarily that person's true IQ, but rather indicates the range within which his or her true IQ would fall. The standard error of measurement is three to five points on either side of the individual's score on a single test, depending on the accuracy desired. A full-scale IQ score of 70 on a single test indicates a 68% probability that the test-taker's true IQ falls between 73

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Flynn effect,[3] the low range of his properly-adjusted, full-scale IQ score on each test falls below 70.[4]

Winston unsuccessfully sought an evidentiary hearing on his ineffective assistance claim and unsuccessfully sought funds to hire a psychologist or psychiatrist to help him prove that he is mentally retarded. The Supreme Court of Virginia rejected his *Atkins* claim because he procedurally defaulted it and rejected Winston's ineffective assistance claim because it did not satisfy *Strickland*. *Winston v. Warden,* 2007 Va. LEXIS 43, 2007 WL 678266, at *15. The court noted that, in Virginia "the maximum score for a classification of mental retardation is an IQ score of 70," while Winston's full-scale IQ scores were 77, 73, and 76. *Id.* The court discounted the Special Education Department's 1997 mild retardation classification

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and 67, or a 90% probability that the test-taker's true score falls within 75 and 65.

[3] As Winston argued in the Virginia Supreme Court, "[t]he Flynn Effect recognizes the fact that particular versions of intelligence tests become less accurate estimators of IQ over time. In fact, for each year after a test is first introduced, Flynn's research showed that the test may overestimate the subject's actual IQ by 113 points or more." 50 Page Prophylactic Petition for Writ of Habeas Corpus at 35, *Winston v. Warden,* 2007 Va. LEXIS 43, 2007 WL 678266.

[4] Winston contended that after adjusting for the SEM and the Flynn effect, his true full-scale IQ scores range from 68 to 78 on the 1987 test, 63 to 73 on 1990 test, and from 69 to 79 on the 1995 test. 50-Page Prophylactic Petition for Writ of Habeas Corpus at 36, *Winston v. Warden,* 2007 Va. LEXIS 43, 2007 WL 678266.

because the Fairfax County schools could classify a student as mentally retarded even with an IQ score above 70. *Id.* Therefore, it found that Winston had offered "no objective data in support of his claim of mental retardation" and "no documentation that he was diagnosed as being mentally retarded before the age of 18 in accordance with the legal definition of mental retardation established by the legislature." *Id.* Accordingly, it concluded that Winston failed to demonstrate that his counsel's performance was deficient or that there was a reasonable probability that but for counsel's alleged error, the result of the proceeding would have been different. *Id.*

In this court, Winston maintained that he was entitled to an evidentiary hearing in connection with his federal habeas petition on his ineffective assistance claim as it relates to his *Atkins* claim. Because the court found it had discretion to hold an evidentiary hearing, *see Schriro v. Landrigan*, 550 U.S. 465, 127 S. Ct. 1933, 1939, 167 L. Ed. 2d 836 (2007), and it exercised its discretion to grant that hearing, the court found it unnecessary to determine whether Winston was *entitled* to an evidentiary hearing. *Winston v. Kelly*, 2008 U.S. Dist. LEXIS 42565, 2008 WL 2234587, at *28.

Both Drewry and Berger testified at the evidentiary hearing that they did not read every page of Winston's records before sending them to Dr. Nelson, and that they did not recall seeing any records referencing Winston's 1997 mild retardation classification during their representation. Both

testified that if they had seen these records, they would have claimed that Winston was mentally retarded and not eligible for the death penalty under *Atkins* and that they had no strategic reason to not pursue such a defense. Dr. Nelson testified that though he likely saw the 1997 mild retardation classification in Winston's records, he could not be certain because he could not recall seeing it and did not list it among the sources in his Capital Sentencing Evaluation. Nelson also testified that counsel did not provide him with information from certain teachers, social workers, and family members whose input would have been relevant in assessing adaptive functioning.[5]

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[5] Two of the individuals mentioned testified at the evidentiary hearing. Denise King, Winston's teacher at the Leary School in Fairfax County for four years, testified that Winston had difficulty reading and following directions. When he was 12 years old, King estimated his reading skills were on a second grade level and his math skills were on a fourth grade level and that he generally had problems following directions. Kirsten Jackson, a close relative who lived with Winston for 10 years of their childhood, testified that as a child Winston once blew up the family's microwave, could not do his own laundry, failed to do assigned chores and take baths on his own initiative, did not understand his school work, and was teased by the other children in the family.

Dr. Nelson did not interview King or Jackson in preparing his Capital Sentencing Evaluation on Motion of the Defense. Nelson's evaluation was based on his interviews with Winston's mother, maternal grandmother, and other family members as well as his review of Winston's records in school, court, and social services. (Pet'r's Ex. H at 1-2.) With the new information

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Marilynn Schneider Lageman also testified at the evidentiary hearing. Lageman was a psychologist in the Fairfax County schools and a member of the Special Education Department committee that recommended the 1997 psychological evaluation. Winston's federal habeas counsel, who was also his state habeas counsel, first located Lageman on November 6, 2008 in Blanco, Texas, twenty-one months after the Supreme Court of Virginia dismissed Winston's state habeas petition and two weeks before this court's evidentiary hearing. Lageman testified that she had performed a psychological evaluation that led to Winston's 1997 mild retardation classification and that she had retrieved this psychological evaluation from a computer disk stored in her home.[6]

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presented on habeas review, Nelson acknowledged the possibility his opinion might have been different.

[6] Lageman found this psychological evaluation on a disk stored in a locked room of her home. Though the school kept official records, Lageman kept her disks in a desk drawer in her office when she worked for Fairfax County schools, and when she moved to Texas in 2007 she simply packed up those disks along with her other materials. Lageman acknowledged the school did not require her to keep copies of the record and it "could be possible, not likely" that the report saved on her disk did not reflect the final version of the psychological evaluation. (Tr. 38.) The Warden objected to the admission of this evaluation. The court overruled the objection and received the document without deciding "for what purpose and in what context it should be considered." (Tr. 15.)

As a part of this evaluation, Lageman administered the WISC-III IQ test. On that test, Winston received a verbal IQ score of 60, and a performance IQ score of 77, and a full-scale IQ score of 66. Lageman's report noted that Winston "was cooperative and attempted all tasks presented" during the evaluation, but that his "verbal cognitive skill development falls within the mild range of mental retardation for his age" while "[n]onverbal areas of cognitive functioning are somewhat more developed." (Pet'r's Ex. F at 2-3.) Though another psychologist was on the committee that ultimately determined Winston was mildly retarded, Lageman noted that such determinations depended on diagnostic criteria, including "[c]ognitive delays . . . based on an IQ test with a score below 70, taking into consideration . . . standard error measurements," "[s]ocial and adaptive skills that also fell in the mild range of mental retardation," and "teacher narratives, parent comments, classroom behavior [and] any information that [the committee] could get regarding people's impressions of the student, to make sure all areas were pretty much falling below that level." (Tr. 5.) She testified that the committee "typically requested" a standardized adaptive skills test "when mental retardation was an area of possible concern."[7] (Tr. 9-10.)

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[7] Christine Johnson, who worked in the Special Education Department and signed Winston's 1997 mild retardation classification, testified that the form indicates that the committee

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Winston's mental retardation expert, Dr. Daniel Reschly, opined that "to a reasonable degree of psychological certainty," before he reached age 18, Winston was mentally retarded under Virginia law. (Tr. 72-73.) As to the intellectual functioning component, Dr. Reschly testified that, when considering both the Flynn effect and the SEM, the low range for Winston's 1987, 1990, and 1995 IQ test scores[8] are more than two standard deviations below the mean.[9] Though Dr. Reschly described the Flynn effect as "controversial" and noted that "there is not a consensus" on its application, he named two psychological sources that do recommend applying it.[10] (Tr. 79-81.) He also noted variations in Winston's

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was unanimous in its determination that Winston was eligible for special education based on mild retardation. She also stated that the committee would have assessed the student's adaptive behavior based on a standardized measure before making a mental retardation determination.

[8] Dr. Reschly prepared his report before Winston located the fourth IQ test with the full-scale score of 66. Dr. Reschly did discuss the fourth test during his testimony at the hearing.

[9] Dr. Reschly also noted that, considering the Flynn effect alone, only Winston's 1990 IQ score is more than two standard deviations below the mean.

[10] Dr. Reschly noted that the task force of Division 33 of the American Psychological Association does "take into account the Flynn effect by adjusting the population mean or by subtracting points from IQ scores obtained with tests whose norms are out of date." (Tr. 84-86.) Further, he read passages from the 2007 user guide of the American Association of Mental Retardation's classification manual which acknowledges the existence of the Flynn effect and states "[i]n cases where tests with aging norms

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scores on IQ subtests, but could not explain them.[11] Dr. Reschly opined "to a reasonable degree of psychological certainty" that Winston had conceptual, social, and practical adaptive deficits before age 18.[12] Dr. Reschly based these conclusions on, among

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is [sic] used, a correction for the aging norms is warranted," and gives an example of how to adjust the population norm. (Tr. 82.)

[11] Dr. Reschly testified that Winston's verbal IQ score of 60 indicates "that he is significantly impaired in the use of reasoning and judgment in coping with the environment, and in assuming responsibility for his own behavior," (Tr. 90) and he stated that the reports of Winston's receptive and expressive language abilities seemed inconsistent with the verbal IQ score of 91 obtained in 1987. Reschly could not explain why Winston's verbal IQ had decreased from 91 to 60 while his performance IQ increased from 67 to 89 between 1987 and 1995.

[12] As evidence of conceptual adaptive deficits, Dr. Reschly noted that Winston received low scores on standardized testing for literacy and other basic skills while in school, performed poorly in reading and writing instructions, and had difficulty communicating. (Pet'r's Ex. A at 22-29.) As evidence of social adaptive deficits, Dr. Reschly noted Winston's perceived immaturity, passiveness, and desperation for peer acceptance. (Pet'r's Ex. A at 29-32.) As evidence of practical adaptive deficits, Dr. Reschly noted Winston's inadequate money handling skills, his dependence on others for transportation, and failure to hold down a traditional job. (Pet'r's Ex. A at 32-33.)

Dr. Reschly based his assessment of adaptive functioning partially on the Adaptive Behavior Assessment System Test (ABAS-II) administered to King and Kathy Hartka, Winston's Fairfax County guardian for three years, based on their memories of Winston's behavior. By giving the test to King and Hartka, Dr. Reschly intended to "gain the perceptions of [Winston's] adaptive behavior from two competent, knowledgeable adults." (Tr. 121.) However, Dr. Reschly himself noted that such retrospective assessments "have limited utility." (Tr. 121.)

other sources, his interviews with Winston, some of Winston's relatives, a former guardian, and a former teacher, and on his review of Winston's criminal file, school records, and Dr. Nelson's report.

The Warden's expert, Dr. Leigh Hagan, reached the opposite conclusion based on an interview with Winston and a review of Winston's educational and legal records. He opined "that the totality of the behavioral science evidence does not indicate the onset of [mental retardation] originating before the age of 18 years." (Resp. Ex. A at 34.) Dr. Hagan testified that there is a lack of consensus as to the cause of the Flynn effect, though the generally accepted practice is to account for the Flynn effect by renorming standardized tests or by "address[ing] it in narrative form, but not to subtract IQ points that the individual has earned." (Resp. Ex. A at 32.) He also noted that there is no basis in practice for using SEM to find that an individual's true IQ falls in the range below the earned score on a given IQ test because it was equally likely that the test-taker's true IQ could fall in the range above the earned score. Dr. Hagan noted the "wide variability" in Winston's scores on individual subtests of the IQ test (Tr. 319-328), and noted that "[s]everal factors can suppress scores." (Resp. Ex. A at 32.) Finally, he concluded that

Winston's limitations in adaptive behavior did not significantly impair his functioning.[13]

At the conclusion of the evidentiary hearing, the court asked habeas counsel whether Winston had failed to develop the record in his state habeas proceeding because the Supreme Court of Virginia did not have before it the evidence counsel obtained from Lageman and the score from the IQ test she administered in 1997. Counsel responded that the appropriate question was whether Winston had failed to exhaust, and stated that there was no such failure here because Winston had alleged that he "was classified as mentally retarded by the Fairfax County

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[13] Dr. Hagan concluded that Winston's conceptual adaptive deficits "did not significantly impair his capacity to adapt to the requirements of life" (Tr. 226.) because Winston's competence to stand trial, waive rights, or testify had never been challenged, Winston had engaged in self-advocacy by preparing a lie to cover for his driving without a license offense in other proceedings, and Winston understood and followed the subject-matter limitations of his interview with Hagan. (Resp. Ex. A at 20-22.) Dr. Hagan also concluded that Winston's social adaptive deficits "were not of an order of magnitude to impair his capacity to engage others in relationships of his choosing, to communicate his needs and interests and to anticipate how others might react to what he's presenting to them through words and behavior" because he found that Winston had wooed a girlfriend in Lynchburg who looked after his needs and had set up alliances in drug dealing. (Resp. Ex. A at 22-25.) Dr. Hagan also concluded that Winston's practical adaptive deficits "were not significantly substandard for his peer group and chosen lifestyle" because he found that Winston had held several jobs, knew how to use tools for cutting wood and building a cabin, and had learned to navigate in an unfamiliar city. (Resp. Ex. A at 25-30.)

Schools. . . . that Fairfax County had conducted new IQ testing prior to reclassification. . . . [and] that Winston had received a qualifying score on that IQ test." (Tr. 405.) When asked whether they had sought a subpoena from the Supreme Court of Virginia to obtain the fourth IQ test, Winston's counsel conceded they had not because the Supreme Court of Virginia almost never granted evidentiary hearings and such a request would have been futile. (Tr. 408-09.)

II.

Winston maintains that the evidence adduced at the evidentiary hearing proves that he is mentally retarded and that *Atkins* bars his execution, or at a minimum, that there is a reasonable probability that but for counsel's unprofessional errors, the jury would not have sentenced him to death. Before addressing the merits of Winston's ineffective assistance claim, the court retraces the legal principles, findings, and conclusions that led it to grant an evidentiary hearing.

Winston's petition is governed by 28 U.S.C. § 2254 and Chapter 154 of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. §§ 2261-66 ("AEDPA"). The Supreme Court of Virginia's rejection on the merits of Winston's ineffective assistance claim for failing to prepare and raise an *Atkins* claim is an adjudication of the merits. *Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000). Under the AEDPA, federal courts reviewing habeas

petitions by state prisoners must defer to the merits decisions of state courts:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court adjudication is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court of the United States] on a question of law or if the state court decides a case differently than the [Supreme Court of the United States] has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court decision unreasonably applies clearly established federal law "if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably

applies that principle to the facts." *Id.* at 413. It is insufficient that a state court applied federal law incorrectly; relief may be granted only if the application of federal law is unreasonable. *Id.* at 411. The state court's factual determinations are "presumed to be correct," and the petitioner bears the burden of rebutting that presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Though the Fourth Circuit has not ruled on the issue, federal courts in other circuits have held evidentiary hearings to assess the reasonableness of a state court's adjudication. *Valdez v. Cockrell,* 274 F.3d 941, 952 (5th Cir. 2001) (noting that an evidentiary hearing in federal court "may assist the district court in ascertaining whether the state court reached an unreasonable determination under either § 2254(d)(1) or (d)(2)"); *Teti v. Bender,* 507 F.3d 50, 59 (1st Cir. 2007) ("While it might seem questionable to presume the correctness of material facts not derived from a full and fair hearing in state court [under 28 U.S.C. § 2254(e)(1)], the veracity of those facts can be tested through an evidentiary hearing before the district court where appropriate."); *Davis v. Lambert,* 388 F.3d 1052, 1065 (7th Cir. 2004) (finding that pre-AEDPA standards govern the granting of a hearing when the petitioner has developed the factual basis of his claim and remanding for an evidentiary hearing though "at this point in the proceedings, it is far from clear that the state courts did not unreasonably apply *Strickland* in finding no prejudice"). This court does not presume to reconcile

these approaches. However, with limited exceptions, such hearings are prohibited under the AEDPA "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). To avoid this prohibition, the petitioner must have acted with diligence to develop the claim in state court. "Diligence will require in the usual case that the [petitioner], at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams (Michael) v. Taylor*, 529 U.S. 420, 437, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000).

Conversely, "[a] petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if he satisfies one of the six factors enumerated by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 313, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)." *Conaway*, 453 F.3d 567, 582 (4th Cir. 2006). Those factors are:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court

> hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend, 372 U.S. at 313. But even if the petitioner is not entitled to a hearing, the district court may grant an evidentiary hearing in its discretion so long as the petitioner has not failed to develop the factual basis for that claim in state court. *Schriro*, 127 S. Ct. at 1939 ("Prior to the [AEDPA], the decision to grant an evidentiary hearing was generally left to the sound discretion of district courts. That basic rule has not changed." (citations omitted)). In exercising that discretion, however, a district court must be mindful that it must view the petitioner's claim through the AEDPA's highly deferential statutory lens: "[b]ecause the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." *Id.* at 1940.

With the above precepts in mind, the court exercised its perceived discretion to grant an evidentiary hearing. As stated earlier, by his own account Drewry thought the records he failed to read would have been "very valuable" because they documented that the "*Commonwealth* diagnosed [Winston] with mental retardation as a child." (App. 338-39.) Nevertheless, the Supreme Court of Virginia found that counsel's performance was not deficient. Although counsel's "strategic choices made after thorough investigation . . . are virtually

unchallengeable," *Strickland*, 466 U.S. at 690, contextually, simply not reading essential documents that are facially significant to competent capital defense counsel did not seem to this court to be any choice at all.[14] Under the circumstances, this court concluded that it was not implausible that Winston could establish deficient performance, even in light of the AEDPA's deferential standards.

But even if Winston demonstrated deficient performance, establishing ineffective assistance of counsel also requires him to prove prejudice – a reasonable probability that but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Although Winston's task was difficult because of the three earlier full-scale IQ scores, the court did not find it wholly implausible that Winston could demonstrate that prejudice resulted from Drewry's failure to review the records and learn of the 1997 classification. The overarching question, as this court

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[14] The court is aware of and sensitive to the difficulties and burdens capital trial counsel must frequently shoulder. It is essential that they be able to delegate certain tasks and rely on expert opinions with confidence. Cf. *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998) (observing that, where counsel had received psychologist's opinion that defendant was not mentally ill at time of offense, "counsel was not required to second-guess the contents of this report," but rather "understandably decided not to spend valuable time pursuing what appeared to be an unfruitful line of investigation." (internal quotation marks omitted)). However, capital trial counsel cannot outsource their fundamental responsibilities.

viewed it, was not the ultimate question that a criminal trial jury would determine – whether Winston was in fact mentally retarded under Virginia's definition – but whether there was a reasonable probability that a trial jury could conclude that he was. Given Drewry's assertion that he would have taken different steps during his representation of Winston if he had read the records, and given this court's conclusion that Winston diligently attempted to demonstrate both that he was mentally retarded and that the evaluation supporting that claim had been destroyed, the court thought it appropriate to hold an evidentiary hearing to scrutinize carefully the question of prejudice.[15] Accordingly, this court ordered the evidentiary hearing.

III.

When the Supreme Court of Virginia adjudicated Winston's ineffective assistance claim, it confronted three full-scale IQ test scores over 70 and circumstantial evidence of a likely destroyed fourth test result, that may have reflected a score of 70 or

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[15] The evidence presented at the hearing also addressed Winston's claim that *Atkins* bars his execution because he is mentally retarded. Since Winston has procedurally defaulted this claim, the court may reach the merits only if it finds "cause for the procedural default and prejudice attributable thereto." *Murray v. Carrier*, 477 U.S. 478, 485, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Since Winston can establish cause by proving ineffective assistance of counsel, the court examines that claim first. *Id.* at 488.

below. In contrast, Winston located and presented to this court the actual result from the fourth test, reflecting a full-scale score of 66. However, he has demonstrated no valid reason why he could not have presented that same evidence to the Supreme Court of Virginia. This raises the interrelated questions of whether Winston failed to develop in state court proceedings the factual basis he now relies on to support his ineffective assistance claim and whether Winston has failed to exhaust that claim. Post hearing, these questions are perhaps best viewed analytically as exhaustion questions: whether the current incarnation of Winston's ineffective assistance claim was fairly presented to the Supreme Court of Virginia or whether Winston has fundamentally altered the claim he presented. This court concludes that Winston did not fairly present the current incarnation of his ineffective assistance claim to the Supreme Court of Virginia and that he fundamentally altered the claim he presented. Consequently, Winston has failed to exhaust his newly positioned ineffective assistance claim, and since the Supreme Court of Virginia will no longer consider the claim, the claim is also procedurally defaulted and the court can consider it only if Winston satisfies the miscarriage of justice exception to the procedural default rule by showing that he is actually innocent of the death penalty.

When a habeas claim presents interrelated questions of factual development and exhaustion after an evidentiary hearing, the issue is perhaps "more accurately analyzed under the 'exhaustion' rubric of

§ 2254(b)." *Douthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000).[16] Exhaustion, which is rooted in federalism and comity, requires the petitioner to "fairly present[ ]" his claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). To "fairly present" a claim, "the petitioner must have presented to the state court 'both the *operative facts* and the controlling legal principles.'" *Kasi v. Angelone*, 300 F.3d 487, 501-02 (4th Cir. 2002) (emphasis added) (quoting *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997)). "[T]he state courts must be given a fair opportunity to apply controlling legal principles to the facts bearing upon [a petitioner's] constitutional claim." *Wise v. Warden*, 839 F.2d 1030, 1033 (4th Cir. 1988) (internal quotations omitted) (insertion in original). As long as the new evidence does not "*fundamentally alter*

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[16] As noted earlier, the failure to develop inquiry is governed by 28 U.S.C. § 2254(e)(2): except in certain narrowly circumscribed instances, that provision prohibits the district court from holding an evidentiary hearing on a claim if the petitioner failed to develop the factual basis of that claim in the state court proceedings. To avoid this prohibition, petitioner must have acted with diligence to develop the facts in state court. If he has done so, § 2254(e)(2) is no obstacle to a hearing. *See Williams (Michael)*, 529 U.S. at 430. Federalism and comity underpin the failure to develop inquiry. Although nothing prohibits the court from revisiting its earlier decision that petitioner did not fail to develop the record in the state court proceedings (assuming the court made the right call at the time), analytically the question of whether the court is able to consider new evidence developed at the hearing is an exhaustion question.

the legal claim already considered by the state courts," the petitioner has satisfied the exhaustion requirement. *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (emphasis added). "Where questions concerning exhaustion arise, the petitioner bears the burden of demonstrating that the state remedies have, in fact, been exhausted." *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994).

It is clear that the new evidence obtained from Lageman fundamentally alters the operative facts the Supreme Court of Virginia confronted when it concluded that Winston failed to show prejudice. Had the Supreme Court of Virginia confronted a full-scale IQ score of 66, it might have viewed the *Strickland* prejudice prong differently. Instead, Winston presented three scores over 70 and evidence that a likely non-retrievable fourth score might have been under 70. Therefore, there is a substantial difference between the operative facts that the Supreme Court of Virginia confronted and the operative facts presented here. There is a substantial difference between a likely non-retrievable score that might have been below 70, and an actual score of 66. The Supreme Court of Virginia did not have a "fair opportunity" to adjudicate the claim as Winston has positioned it in this court. Indeed, any other reading of the "fair opportunity" component of the exhaustion requirement would fail to give effect to the AEDPA's mandate that the reasonableness of the state court's factual findings be assessed "in light of the evidence presented in the state court proceeding." 28 U.S.C.

§ 2254(d)(2); *see Holland v. Jackson*, 542 U.S. 649, 652, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004) (per curiam) ("[W]e have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it."). Therefore, the court concludes that Winston failed to exhaust his claims he presented in this court in the Supreme Court of Virginia.

In reaching this conclusion, the court notes that Winston's circumstances are not analogous to the "classic catch-22" situation in which a petitioner must submit appropriate evidence to the state court in order to be accorded an evidentiary hearing, and the state court has denied him the subpoena power necessary to obtain that evidence. *See Conaway*, 453 F.3d at 584. Habeas counsel's reasoning that they were free to forego requesting a subpoena on futility grounds does not pass muster because it "undermine[s] the policies of comity and efficiency that underlie the exhaustion doctrine." *See Wise*, 839 F.2d at 1033. It is equally fundamental that habeas counsel has suggested no sustainable reason why they could not have approached Lageman earlier during the pendency of state habeas proceedings and secured the same evidence and presented that evidence to the Supreme Court of Virginia. Consequently, Winston has not exhausted the prejudice prong of his ineffective assistance claim to the extent that it depends upon those new facts, and because Virginia will not consider the newly

positioned claim,[17] it is simultaneously unexhausted and defaulted.

In concluding that Winston's newly presented IQ evidence fundamentally alters the claim he presented to the Supreme Court of Virginia, the court notes that the circumstances in this case differ from the circumstances the Fifth Circuit confronted in *Morris v. Dretke*, 413 F.3d 484 (5th Cir. 2005), when it held that new IQ evidence did not fundamentally alter Morris's *Atkins* claim and his claim was therefore exhausted. In *Morris*, the petitioner lacked IQ evidence, but "the *crucial fact* that Morris possessed sufficient indicators for a diagnosis of mental retardation had already been presented to the state courts." *Id.* at 498 (emphasis added). In contrast, in state habeas Winston presented three IQ scores above 70. He alluded to a potential fourth IQ test that was possibly above 70, but his petition included an affidavit concluding that the test was probably destroyed. Under these circumstances, there was affirmative evidence before the Supreme Court of Virginia that Winston did not meet Virginia's intellectual functioning requirement. Moreover, it was not ascertainable from the state court record whether this additional test would ever surface, and

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[17] As the Fourth Circuit explained in *Hedrick v. True*, Virginia Code § 8.01-654.1 limits capital habeas petitioners "to one state habeas petition filed within sixty days of the denial on direct appeal of the petitioner's petition for writ of certiorari with the United States Supreme Court." 443 F.3d at 365.

if it did, whether it would even support a finding of subaverage intellectual functioning under the Virginia statute.

Accordingly, the court finds that in light of the new evidence presented for the first time in federal court, Winston's claim as presented in this court is unexhausted. Since the newly positioned claim is procedurally defaulted in state court, this court may examine it only if Winston satisfies the miscarriage of justice exception by demonstrating that he is "actually innocent of the death penalty."

IV.

Winston contends that any procedural default is excused under the fundamental miscarriage of justice exception to the procedural default rule because he is "actually innocent of the death penalty" due to his mental retardation, a claim he can never default. In its earlier opinion, the court addressed and rejected Winston's argument that he is actually innocent of capital murder because he was not the triggerman in the shooting, *Winston v. Kelly*, 2008 U.S. Dist. LEXIS 42565, 2008 WL 2234587, at *5-7, but it did not address Winston's current claim that he is actually innocent of the death penalty because he is mentally retarded. It does so now in light of all of the evidence, including all the evidence presented at the evidentiary hearing, and concludes that Winston has failed to establish that he is actually innocent of the death penalty.

A state habeas petitioner whose claims are procedurally defaulted "may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). The actual innocence standard is "demanding and permits review only in the extraordinary case." *House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (internal quotations and citations omitted). "[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404. Though "the concept of 'actual innocence' [does] not translate easily . . . into the capital sentencing context," this court may reach the merits of a state prisoner's defaulted claims on habeas review if he shows that "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336, 340, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).[18] In

[18] Virginia requires the defendant to prove by a preponderance of evidence that he is mentally retarded. Va. Code Ann. § 19.2-264.3:1.1(Q). Recognizing that the actual innocence standard contains a clear and convincing burden of proof for "those elements that render a defendant eligible for the death penalty," *Sawyer*, 505 U.S. at 336, 347, here the court applies the more lenient preponderance of the evidence standard to Winston's claim of actual innocence because he argues his mental retardation, as defined by the Virginia statute, renders him

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determining whether a habeas petitioner has met this standard, a federal habeas court "must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the 'rules of admissibility that would govern at trial.'" *House v. Bell,* 547 U.S. at 538 (quoting *Schlup v. Delo,* 513 U.S. 298, 327-28, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). It must then make "a probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup,* 513 U.S. at 329.

Essentially, Winston's new evidence of subaverage intellectual functioning is a full-scale IQ score of 66 and conflicting testimony about whether the Flynn effect and the SEM should be used to adjust Winston's previous three full-scale IQ scores that are above 70, resulting in scores with ranges that partially fall two standard deviations below the mean. Dr. Hagan, the Warden's expert, rejected adjusting Winston's scores to account for the Flynn effect and the SEM because neither textbooks nor practitioners recommended adjusting individual scores for the Flynn effect, and there was no basis for using an SEM to find that an individual's true IQ falls in the range below the earned score rather than above it. Even Dr. Reschly,

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categorically ineligible for the death penalty. This court assumes, but does not decide, that this more lenient burden applies as a result of the preponderance standard specified by the Virginia statute and the necessity of applying actual innocence jurisprudence to an *Atkins* claim.

Winston's expert, testified that the Flynn effect was "controversial" and that there was "not a consensus" on its application.

The new evidence of adaptive behavior limitations also is conflicting and equivocal. Dr. Reschly opined to a reasonable degree of psychological certainty that Winston had significant limitations in adaptive behavior before the age of 18, and he based this conclusion on his interviews with Winston, and Winston's relatives, former guardian, and school teacher, as well as his review of Winston's criminal file, school records, and Dr. Nelson's report. Dr. Hagan testified that Winston had adaptive behavior deficits, but in his opinion Winston's limitations did not significantly impair his functioning. He based his conclusion on his interview with Winston and his review of Winston's court and school records.

Having considered the new evidence of mental retardation in light of all the other evidence in the record, the court concludes that Winston has failed to "make the stringent showing" required to prove that he is actually innocent of the death penalty. *House v. Bell*, 547 U.S. at 522. A reasonable juror could find Winston's three IQ scores over 70 more persuasive than his one score below 70 and could reject the factual assertion that these higher scores should be adjusted downward for the Flynn effect or the SEM.[19]

[19] *Atkins* left to the states the responsibility of defining mental retardation, and the Virginia Supreme Court is the

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A reasonable juror could also reject Winston's evidence of adaptive behavior deficits, given the differing expert testimony and the even larger and more conflicting spectrum of adaptive behavior information in the record. Simply put, Winston cannot show that no reasonable juror would have found him eligible for the death penalty. Accordingly, his claim of actual innocence cannot excuse the procedural default of his newly positioned ineffective assistance claim or his *Atkins* claim.

V.

As this court has made plain, it granted Winston a hearing on his ineffective assistance claim because it did not find it wholly implausible that he could prove that claim even in light of the AEDPA's deferential standards. Consequently, it held a hearing without first deciding that the Supreme Court of Virginia's adjudication of the claim was based on unreasonable determination of the facts "in light of the evidence presented in the State court proceeding" – a prerequisite to relief under 28 U.S.C. § 2254(d)(2). The court has yet to decide expressly whether Virginia's adjudication of Winston's ineffective assistance claim, *as it was fairly positioned before*

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ultimate arbiter of what the Virginia statute defining mental retardation requires. Although this court considers the Flynn effect and the SEM in its actual innocence of the death penalty calculus, it assumes without deciding that the court can consider them.

that court, was based on an unreasonable determination of the facts, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court; until now, it has only decided that it might be.[20] This is procedurally problematic because considering the evidence presented for the first time in federal court – for any purpose other than determining "actual innocence of the death penalty" – without first deciding whether the Supreme Court of Virginia unreasonably adjudicated Winston's ineffective assistance claim skirts the temporal nature of review 28 U.S.C. § 2254(d)(2) contemplates.[21] Therefore, the

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[20] At the court's request, the parties have addressed the interplay between the AEDPA's deferential standards and the evidence adduced at the evidentiary hearing. Winston maintains that because the court properly granted an evidentiary hearing, it no longer assesses reasonableness under 28 U.S.C. § 2254(d)(2) and that 28 U.S.C. § 2254(e)(1) provides the only applicable deferential prism. The Warden maintains that this court cannot consider new evidence adduced at the evidentiary hearing unless it first determines, without regard to that new evidence, that the Supreme Court of Virginia's adjudication of Winston's ineffective assistance claim was legally and/or factually unreasonable "in light of the evidence presented in the State court proceeding" as 28 U.S.C. § 2254(d)(2) requires.

[21] The Supreme Court has not explained whether the AEDPA's deferential standards apply when a federal court hears new evidence that was not presented in the state court but nevertheless finds that the petitioner has properly exhausted the available remedies. *See Holland v. Jackson*, 542 U.S. at 653 ("Where new evidence is admitted, some Courts of Appeals have conducted de novo review on the theory that there is no relevant state-court determination to which one could defer.") (citing *Monroe v. Angelone*, 323 F.3d 286, 297-99 & n.19 (4th Cir. 2003)).

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court concludes that a retrospective analysis is now appropriate and finds from that analysis that the Supreme Court of Virginia's decision that Winston failed to show prejudice from his counsel's allegedly deficient performance was not an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The court also finds that the Supreme Court of Virginia's decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law under 28 U.S.C. § 2254(d)(1). Consequently, the court dismisses Winston's ineffective assistance claim and also finds that it cannot serve as cause and

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In *Monroe*, the Fourth Circuit reviewed a *Brady* claim based on evidence presented in state habeas and evidence presented for the first time in federal court. Although the Fourth Circuit accorded AEDPA deference on an "item-by-item" basis to the state court's determination that particular pieces of evidence were exculpatory, it could not defer to the state court's determination of *Brady*'s materiality element because that element required a collective assessment of the withheld evidence and "no state court considered all the *Brady* material presented here." *Monroe*, 323 F.3d at 298-99. As a result, when "newly discovered evidence [was] . . . the proverbial straw that broke the camel's back," *id.* at 299 n.19, the Fourth Circuit concluded that federal courts would need to make an "independent assessment" of the evidence underlying the *Brady* violation. *Id.* at 299. In this case, the court need not address these analytical concerns because it has already determined that Winston has failed to exhaust his ineffective assistance claim based on the newly presented IQ evidence in federal court.

prejudice to excuse the procedural default of his *Atkins* claim.[22]

In rejecting Winston's ineffective assistance claim, the Supreme Court of Virginia noted that the evidence of record did not support the conclusion that Winston was mentally retarded "in accordance with the legal definition of mental retardation established by the legislature." *Winston v. Warden*, 2007 Va. LEXIS 4, 2007 WL 678266, at * 15. That court then fairly summarized the evidence of record insofar as it related to the subaverage intellectual functioning prong of Virginia's statutory definition of mental retardation:

> The record, including the evidence presented at trial and the documents upon which petitioner now relies, demonstrates that petitioner was administered three standardized tests for measuring intellectual functioning. Petitioner achieved full-scale scores of 77, 76, and 73 on three administrations of the Wechsler Intelligence Scale for Children-Revised. While petitioner

[22] As this court stated in its previous opinion, there is a split of authority as to whether a federal habeas court must continue to defer to the state court's adjudication of a freestanding ineffective assistance of counsel claim when the federal habeas court decides whether that claim constitutes cause for procedural default. *Winston v. Kelly*, 2008 U.S. Dist. LEXIS 42565, 2008 WL 2234587, at * 10 n.6. For the reasons stated in that opinion, the court applies the AEDPA's deferential lens to the ineffective assistance claim when presented as cause for procedural default. *Id.*

> offered evidence that he was once described as "mildly mentally retarded" for the purposes of special education eligibility, the definitions of mental retardation provided by petitioner demonstrate that for special-education eligibility, a candidate may, nonetheless, have an IQ score above 70. Furthermore, petitioner offers no objective data in support of his claim of mental retardation.

Id. Although Winston quibbles with the Supreme Court of Virginia's characterization of the overlooked evidence as evidence that Winston was once described as "mildly mentally retarded" for special education purposes based on a definition that includes IQ scores above 70, the documents Winston presented to the Supreme Court of Virginia fairly support that characterization. The supporting documents expressly note that a candidate for special education may be able to meet Fairfax County's definition of mental retardation even if he or she has an IQ score above 70. (App. 36.) Therefore, the Supreme Court of Virginia's adjudication of the claim did not result in a decision that was based on unreasonable determination of the facts "in light of the evidence presented in the state court proceeding."[23]

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[23] The Court recognizes that a state court's decision is based on an unreasonable determination of the facts not only when the state court's decision is based on facts that the record does not reasonably support but also when it resolves a factual issue without affording the petitioner process that is adequate under

(Continued on following page)

Winston argues that even if the Supreme Court of Virginia did not unreasonably determine the facts, its adjudication nevertheless resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States within the meaning of 28 U.S.C. § 2254(d)(1).[24]

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the circumstances to resolve the matter the court purports to resolve – when it resolves the facts in a procedurally unfair way. For example, the "classic catch-22" in which a petitioner is obliged to submit appropriate evidence to the state court to receive an evidentiary hearing, and the state court has denied him the subpoena power necessary to obtain that evidence. *E.g. Conaway v. Polk*, 453 at 584; *see also* 1 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 20.2c n 78 (5th ed. 2008).

[24] Before the enactment of the AEDPA, the Supreme Court held in *Strickland* that,

> in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered ineffective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). . . . Although state court findings of fact are made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), . . . both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact."

Strickland, 466 U.S. at 698. Most post-AEDPA cases continue to make clear that both prongs of an ineffective assistance adjudication are subject to § 2254(d)(1)'s unreasonable application provision because "the special prophylaxis of section 2254(d)(2) applies only to determinations of 'basic, primary, or historical facts.'" *Ouber v. Guarino*, 293 F3d 19, 27 (1st Cir. 2002). *But see Czere v. Butler*, 833 F2d 59, 64 (5th Cir. 1987) ("*Strickland*

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He contends that the adjudication is an unreasonable application of clearly established Federal law because in assessing prejudice the Supreme Court of Virginia failed to account for the Flynn effect and the SEM in concluding that Winston's three full-scale IQ scores above 70 provide no objective evidence of his mental retardation. The argument appears to have two rationales. According to the first rationale, the Virginia statute defining mental retardation necessarily requires accounting for the Flynn effect and the SEM. According to this rationale, the Supreme Court of Virginia could not properly assess prejudice – the probability of a different outcome in the state proceeding – without accounting for factors that are necessary to inform the decision of whether Winston's intellectual functioning is in reality two standard deviations below the norm as the Virginia statute contemplates. Under the second rationale, *Atkins* implicitly requires the court to take the Flynn effect and the SEM into account in assessing prejudice.

The Court is not persuaded. As to the first rationale, the Supreme Court of Virginia is the ultimate arbiter of what its statute requires. Winston argued in state habeas that his full-scale IQ scores of 77, 73 and 76 support his mental retardation claim when properly adjusted for the Flynn effect and the SEM. However, by noting that it had "previously held

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requires that petitioner 'affirmatively prove' prejudice. . . . This is an essentially factual inquiry.").

that the maximum score for a classification of mental retardation is an IQ score of 70" and concluding that Winston had no qualifying score, the Supreme Court of Virginia implicitly rejected the argument that Virginia's statutory definition required that either be taken into account. *See Green v. Johnson*, 515 F.3d 290, 300 n.2 (4th Cir. 2008).[20] As to the second rationale, "*Atkins* expressly left to the states the task of developing appropriate ways to enforce the constitutional restriction upon the execution of sentences." *Larry v. Branker*, 552 F.3d 356, 369 (4th Cir. 2009).

[20] At the evidentiary hearing, the court heard from acknowledged experts in the field of mental retardation who have reached nearly opposite conclusions on a fact-laden determination of whether the court should, under the circumstances present here, account for the Flynn effect in evaluating Winston's first three full-scale IQ scores of 77, 76, and 73. They have also disagreed concerning the proper application of the SEM. Winston currently frames the issue of whether the Supreme Court of Virginia was constitutionally required to account for the Flynn effect and the SEM in assessing prejudice as an unreasonable application issue under § 2254(d)(1). Constitutionally required or not, however, the constitutional issue can rise no higher than its facts. Although § 2254(d)(2) prohibits the court from *granting* relief unless the state court's adjudication resulted in decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, that section does not prevent the court from relying on facts the court has independently determined in the course of a hearing to *support* the state court's adjudication of the claim. Under the circumstances here, the court finds that Winston has failed to demonstrate a scientific imperative to adjust his scores.

But Winston's reasoning is flawed at an even more fundamental level because it treats this court's review as though it were de novo. This is habeas, not direct review. "Section 2254(d)(1) requires federal habeas courts to ascertain whether the underlying state court adjudication of a claim on the merits '*resulted in a decision* that was contrary to, or involved an unreasonable application of clearly established' Supreme Court precedent." *Bell v. Jarvis*, 236 F.3d at 160. That section renders immaterial this court's "independent opinion as to whether it believes, based upon its own reading of the controlling Supreme Court precedents, that the defendant's constitutional rights were violated during the state court proceedings." *Id.* Therefore, under the AEDPA, this court does not have the responsibility of determining whether the state court has erred or whether its reasoning is analytically flawed. As *Williams (Terry) v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), made clear, "an erroneous or incorrect decision is not the equivalent of unreasonable one." *Bell*, 236 F.3d at 162 n.9. Indeed, habeas courts must apply § 2254(d)(1) deference to wholly unreasoned, summary adjudications. *Id.* at 158.

In answering the question of whether the Supreme Court of Virginia's rejection of Winston's ineffective assistance claim resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, under Supreme Court precedent, this court assumes deficient performance and focuses on *Strickland*'s prejudice

prong. The question then distills to this: given three full-scale performance IQ scores above 70 and potentially a fourth score that could be below 70, was it objectively unreasonable for the Supreme Court of Virginia to conclude that Winston had failed to show prejudice. The court concludes that it was not objectively unreasonable. Accordingly, the court rejects Winston's ineffective assistance claim as it was fairly positioned before the Supreme Court of Virginia.

VI.

For the foregoing reasons, the court finds that Winston failed to exhaust and has procedurally defaulted his newly positioned ineffective assistance claim, that he cannot excuse this procedural default by showing he is actually innocent of the death penalty, and that the Supreme Court of Virginia's adjudication of the merits of Winston's ineffective assistance claim, as it was fairly positioned before that court, was not unreasonable under 28 U.S.C. § 2254(d), at least as to the prejudice prong. Consequently, the procedural default of Winston's *Atkins* claim is not excused. Therefore, the court **DENIES** his petition for a writ of habeas corpus.

ENTER: This March 6, 2009

/s/ Samuel G. Wilson

UNITED STATES DISTRICT JUDGE

Leon Jermain Winston, Petitioner,
against
Warden of the Sussex I State Prison,
Respondent.

Record No. 052501

SUPREME COURT OF VIRGINIA

2007 Va. LEXIS 43

March 7, 2007, Decided

OPINION

Upon a Petition for a Writ of Habeas Corpus.

Upon consideration of the petition for a writ of habeas corpus filed January 27, 2006, the respondent's motion to dismiss, and petitioner's opposition to the motion to dismiss, the Court is of the opinion that the motion should be granted and the writ should not issue.

Leon Jermain Winston was convicted in the Circuit Court of the City of Lynchburg of capital murder of Anthony Robinson in the commission of robbery or attempted robbery, capital murder of Rhonda Whitehead Robinson in the commission of robbery or attempted robbery, capital murder of Rhonda Whitehead Robinson during the same act or transaction in which another person was willfully, deliberately and with premeditation killed, two counts of attempted robbery, statutory burglary, maliciously discharging a firearm, and five counts of use of a firearm in the commission of a felony. The jury fixed Winston's punishment at death for

each of the three capital murder convictions and at seventy-three years imprisonment for the remaining convictions. The trial court sentenced Winston in accordance with the jury verdict. This Court affirmed Winston's convictions and upheld the sentences of death in *Winston v. Commonwealth*, 268 Va. 564, 604 S.E.2d 21 (2004), *cert. denied*, 546 U.S. 850, 126 S. Ct. 107, 163 L. Ed. 2d 120 (2005).

In claim (I), petitioner alleges that he is actually innocent of capital murder. While conceding that this Court's decision in *Lovitt v. Warden*, 266 Va. 216, 259, 585 S.E.2d 801, 827 (2003), bars consideration of assertions of actual innocence in a petition for a writ of habeas corpus, petitioner contends that *Lovitt* was wrongly decided. We disagree. The Court holds that claim (I) is barred because assertions of actual innocence are outside the scope of habeas corpus review, which concerns only the legality of the petitioner's detention. *Lovitt*, 266 Va. at 259, 585 S.E.2d at 827.

In claim (II), petitioner relies on an affidavit of Dr. J. Thomas McClintock, a purported expert in DNA analysis, who has analyzed the certificates of analysis, the Department of Forensic Science ("DFS") laboratory notes, the trial testimony, and a September 12, 2005 report of an audit conducted of DFS practices, and alleges generally that the DNA evidence that the Commonwealth introduced against petitioner at trial was scientifically invalid. In claim (II)(A), petitioner relies on both Dr. McClintock's affidavit and on an audit of DFS, which was performed

after petitioner's trial and direct appeal, and alleges that the statistical analysis of the DNA evidence introduced at petitioner's trial was "inappropriate" because the analyst "selected only those loci that 'fit' her formulated hypothesis" and inappropriately "disregarded the loci that did not necessarily 'fit' that hypothesis." In claim (II)(B), petitioner relies on Dr. McClintock's affidavit and alleges that the random controls used in analyzing the DNA evidence were flawed. In claim (II)(C), petitioner relies on Dr. McClintock's affidavit and alleges that DFS analysts erroneously interpreted the data, to wit, concluding that certain allelic bands were "stutter" rather than actual alleles of another contributing individual.

The Court holds that to the extent petitioner should have known the basis supporting his claims (II)(A), (II)(B), and (II)(C), before or during trial, claims (II)(A), (II)(B) and (II)(C) are procedurally defaulted because these non-jurisdictional issues could have been raised at trial and on direct appeal and, thus, are not cognizable in a petition for a writ of habeas corpus. *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), *cert. denied*, 419 U.S. 1108, 95 S. Ct. 780, 42 L. Ed. 2d 804 (1975).

To the extent that petitioner's claims are based upon the audit conducted after trial and direct appeal, the Court holds that claims (II), (II)(A), (II)(B), and (II)(C), are not cognizable in a petition for a writ of habeas corpus. "The writ is available only where the release of the prisoner from his immediate detention will follow as a result of an order in his favor. It is not

available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness of his immediate custody and detention." *Virginia Parole Bd. v. Wilkins*, 255 Va. 419, 420-21, 498 S.E.2d 695, 696 (1998).

In claim (II)(DD)(1), petitioner alleges that flaws in the DNA analysis linking petitioner to the murder weapon support petitioner's claim that he is actually innocent of capital murder. The Court holds that claim (II)(DD)(1) is barred because assertions of actual innocence are outside the scope of habeas corpus review, which concerns only the legality of the petitioner's detention. *Lovitt*, 266 Va. at 259, 585 S.E.2d at 827.

In a portion of claim (II)(DD)(2), petitioner relies on the affidavit provided by Dr. McClintock and alleges that the Commonwealth knew the DNA profile developed on the murder weapon strongly suggested multiple contributors of DNA, and that the Commonwealth's failure to disclose this fact constituted a violation of the requirement to disclose exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The record, including motions, orders, exhibits, and the trial transcript, demonstrates that petitioner was provided with the necessary assistance, including access to the DFS case file and the appointment of an expert to conduct an independent review of the DNA examination performed by the DFS. Petitioner does not allege that the Commonwealth withheld information from the file provided to the defense

expert, but instead contends that the Commonwealth had reached and reported erroneous conclusions.

The Court holds that this portion of claim (II)(D)(2) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

In another portion of claim (II)(D)(2), petitioner alleges that the Commonwealth, in violation of *Brady*, failed to disclose certain electronic data that would have allowed petitioner to conduct an independent examination of the data, and that had this information been made available to the jury, there is a reasonable probability that Winston "could have been convicted of a lesser offense." The Court holds that this portion of claim (II)(D)(2) is without merit. Petitioner does not identify specifically the electronic data that he claims the Commonwealth should have disclosed and, thus, he cannot demonstrate that the electronic data contained either exculpatory or material information.

In claim (II)(D)(3), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to identify and challenge the errors relating to the DNA evidence enumerated in claims (II)(A), (II)(B), (II)(C), and (II)(D). The Court holds that claim (II)(D)(3) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The

record, including the trial transcripts, demonstrates that counsel sought and obtained an independent, expert review of the DFS analysis. Petitioner's court-appointed DNA expert reviewed the Commonwealth's analysis and expressed her disagreement with some of the Commonwealth's expert's conclusions. The Commonwealth's expert testified that the DNA evidence recovered from gloves found discarded in the neighborhood near the scene of the murders was a mixture, which matched DNA samples taken from the petitioner, Kevin Brown and David Hardy. Whereas the Commonwealth's expert testified that the probability was greater than one-in-one billion of matching the DNA evidence from the gloves to a different group of three people, the defense expert testified that "the probability of randomly selecting an individual out of the African-American population that would be included . . . for [] evaluation was one in 195." Furthermore, petitioner's own expert testified that the only area of the DFS conclusion with which she disagreed concerned the gloves. Thus, petitioner has failed to show that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In a portion of claim (III), petitioner alleges that the Commonwealth committed prosecutorial misconduct in knowingly presenting the false testimony of Marty Campbell to the grand jury. Campbell testified to the grand jury that petitioner

said he shot "the woman, three times in the face," and that "after Kevin shot the guy," petitioner said he "had to cap [the woman]." Petitioner claims that petitioner did not speak to Campbell and Campbell never spoke to Kevin Brown about these crimes. According to petitioner, Campbell had previously told investigators that none of Campbell's information about the crimes came from either petitioner or Brown.

The Court holds that Code §§ 8.01-654.1 and 8.01-654(B)(2) bar consideration of this portion of claim (III). Code § 8.01-654.1 requires a petition for a writ of habeas corpus filed by a person sentenced to death to be filed within 60 days of the "denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of Supreme Court of Virginia on direct appeal." The Supreme Court of the United States denied petitioner's petition for a writ of certiorari on October 3, 2005; thus, he had until December 2, 2005 to file a petition for a writ of habeas corpus in this Court. Petitioner filed an oversized petition for writ of habeas corpus (which he categorized as "prophylactic") and this Court twice directed him to file a petition for writ of habeas corpus that complied with this Court's rules. On January 27, 2006, petitioner filed the instant petition for a writ of habeas corpus. In an order dated February 28, 2006, this Court accepted the January 27th petition only with respect to those claims that were also raised in the oversized petition for a writ of habeas corpus filed on December 2, 2005. This portion

of claim (III) was untimely filed because it was not included in the oversized petition for a writ of habeas corpus filed in this Court on December 2, 2005. In addition, as the facts which support this allegation were known to petitioner at the time he filed his oversized petition on December 2, 2005, Code § 8.01-654(B)(2) also bars our consideration of this portion of claim (III).

In another portion of claim (III), petitioner alleges that the Commonwealth committed prosecutorial misconduct in knowingly presenting false testimony from Nate Rorls that petitioner called Rorls and confessed to killing the victims. Petitioner contends that Rorls' testimony actually indicated that petitioner called Rorls and confessed to the murders before they took place and that Rorls testified falsely that he first notified the Commonwealth about this telephone call only "a couple days" before trial. Petitioner contends further that the Commonwealth knew this testimony was untruthful because investigators asked Rorls about the call during an interview five months earlier. The record, including the trial transcript, demonstrates that defense counsel was aware of Rorls' earlier statement to the police and used it in cross-examination of Rorls.

The Court holds that this portion of claim (III) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton,* 215 Va. at 29, 205 S.E.2d at 682.

In another portion of claim (III), petitioner alleges that the Commonwealth committed prosecutorial misconduct in knowingly creating false impressions regarding Rorls' negotiations for a plea agreement in connection with federal drug charges in exchange for his testimony against petitioner at petitioner's capital murder trial. Petitioner claims that the Commonwealth concealed its awareness of federal prosecutors' decision to delay the finalization of Rorls' plea agreement until after petitioner's trial. Petitioner maintains that the delay prevented the jury from learning about Rorls' plea agreement, wherein he would serve less than three years of incarceration, as opposed to the fourteen years he told the jury on direct examination that he faced. The record demonstrates that petitioner was aware of the ongoing negotiations and that counsel elicited testimony from Rorls that he actually faced "twenty-five [years] to life."

The Court holds that this portion of claim (III) is factually without merit. The petitioner has failed to allege facts that establish how the Commonwealth violated its obligation to disclose impeachment evidence. The record established that petitioner was aware of ongoing plea negotiations with federal prosecutors and that the negotiations were not completed at the time Rorls testified. Petitioner used this information in his cross-examination of Rorls to establish that Rorls expected to receive favorable treatment as a result of his testimony.

In another portion of claim (III), petitioner asserts that Rorls subsequently received treatment better than Rorls predicted while testifying. In support of this claim, petitioner notes that, following his testimony against Winston, Rorls pled guilty to conspiracy to distribute 50 grams or more of cocaine and instead of serving "twenty-five [years] to life," Rorls was released in less than three years. Petitioner contends that such treatment proves the Commonwealth engaged in prosecutorial misconduct. The Court holds that this portion of claim (III) is factually without merit. The record, including the trial transcript and the exhibits submitted in support of the petition, demonstrates that the Commonwealth properly disclosed that Rorls was in negotiations with federal prosecutors and that Rorls' sentence reduction was the result of his cooperation in 2003 and in 2004 with federal authorities and his testimony in petitioner's case.

In another portion of claim (III), petitioner alleges that the Commonwealth committed prosecutorial misconduct in creating the false impression that petitioner's knowledge of victim Rhonda Robinson's pregnancy was solely attributable to the fact that he was the one that killed her. Petitioner claims the Commonwealth failed to elicit during re-direct examination of Rorls that he stated six months before trial that petitioner knew about the pregnancy from Tywan Turner, the father of Rhonda Robinson's unborn baby. Furthermore, petitioner contends the Commonwealth also knew, from Campbell's grand

jury testimony, that Rhonda Robinson's pregnancy was public knowledge before trial.

The Court holds that, to the extent petitioner is challenging the admission of evidence of Rhonda Robinson's pregnancy, this portion of claim (III) is barred because this issue was raised and decided in the trial court and on direct appeal from the criminal conviction and, therefore, petitioner cannot raise it in a petition for a writ of habeas corpus. *Henry v. Warden*, 265 Va. 246, 249, 576 S.E.2d 495, 496 (2003). To the extent petitioner is challenging the Commonwealth's failure to elicit from Rorls his prior speculation that Winston learned of the pregnancy from Tywan Turner, this portion of claim (III) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

In another portion of claim (III), petitioner alleges that the Commonwealth committed prosecutorial misconduct when, in spite of its knowledge that Tywan Turner was in the City of Lynchburg on the night of the murders, it argued to the jury that Turner could not have committed the murders because the evidence at trial showed that Turner was in Washington, D.C. and not in Lynchburg on the night of the murders. Petitioner submits that Turner told police on the day after the murders that he was in Lynchburg, at home with his girlfriend, on the night of the murders. Second, petitioner contends that the

Commonwealth knew that Patty Whitehead, the sister of Rhonda Robinson and mother to Turner's two children, told police that Turner's son had been visiting Turner, and that Turner returned the child to Patty Whitehead in Lynchburg on the day of the murders. Third, petitioner further contends that Rorls told police and prosecutors that Turner was "down there in Lynchburg" and that Turner brought Winston to Lynchburg from Washington, D.C. so Winston could "retaliate" against individuals who had stolen a safe from his home.

The Court holds that this portion of claim (III) is procedurally defaulted because these non-jurisdictional issues could have been raised at trial and on direct appeal and, thus, are not cognizable in a petition for a writ of habeas corpus. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

In a footnote, petitioner alleges that he was denied the effective assistance of counsel with respect to each of the claims of prosecutorial misconduct raised in claim (III) because counsel had failed "to investigate and present the claims." The Court holds that petitioner's allegation of ineffective assistance of counsel with respect to petitioner's claim (III) does not satisfy the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner has failed to allege with particularity any prejudice he sustained as a result of counsel's alleged failures or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

In claim (IV)(A), petitioner alleges violations of his Sixth, Eighth, and Fourteenth Amendment rights to an impartial jury because several jurors "were exposed to extraneous influences during the course of the trial." Juror Archer Caldwell reported that four jurors were approached during recesses by members of the victims' families, who made statements to these jurors that they should convict petitioner and sentence him to death. The trial court questioned each contacted juror and determined that none of those jurors felt threatened or intimidated and that the contact would not affect their deliberations. The record demonstrates that petitioner raised this argument on direct appeal but that Rule 5:25 prevented this Court from considering the argument because it had not been presented to the trial court.

The Court holds that claim (IV)(A) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

In claim (IV)(B), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to make a timely motion for a mistrial as a result of the victims' families contact with the jurors. Petitioner argues that counsel failed to request that the trial court examine the entire jury panel about the extraneous contact, that counsel should have ensured petitioner's presence during the in-chambers voir dire of the four jurors, and that counsel

should have known about and argued during trial the Court of Appeals decision in *Scott v. Commonwealth*, 11 Va. App. 516, 521-23, 399 S.E.2d 648, 651-52, 7 Va. Law Rep. 1178 (1990), that jurors cannot be expected to admit that they violated their oaths of office, that a defendant is entitled to be tried by no fewer than twelve impartial jurors, and that a new trial must be granted if there is the possibility that the jury's verdict was improperly influenced. Instead, the affidavit of counsel reveals that trial counsel did not know about the decision in *Scott* until after trial, when he cited it to the trial court in a post-trial motion, which petitioner claims the trial court denied as having been untimely filed.

The record, including the post-verdict sentencing transcript, demonstrates that the trial court denied petitioner's motion on the grounds that the court had examined each of the jurors who stated they had been approached, the trial court was satisfied with their answers, and the trial court remained satisfied that petitioner was not prejudiced or harmed. The Court holds that claim (IV)(B) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the affidavit of counsel and the trial transcript, establishes that each juror testified that the contact with third parties did not intimidate or frighten them and would not influence their deliberations. The record further demonstrates that counsel made a tactical decision not to move for a mistrial after discussing the issue with petitioner.

Counsel believed that at least one specific juror would not vote for a death sentence and that they would likely not get another juror like her at a new trial, and that counsel thought, "the trial was leaning our way." Thus, petitioner has failed to show that counsel's performance was deficient or that there is a reasonable probability that a motion for mistrial would have been granted and that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (V)(A), petitioner alleges that he was denied his right to be present during critical stages of trial, to wit, when the trial judge and the Commonwealth's Attorney examined four jurors in the court's chambers. The Court holds that claim (V)(A) is procedurally defaulted because this non-jurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

In claim (V)(B), petitioner alleges that he was denied the effective assistance of counsel because trial counsel failed to ensure petitioner's presence during the examination of the four jurors. Petitioner argues that had he witnessed the reactions of the jurors, he would not have agreed to forego a motion for a mistrial and that the motion likely would have been granted.

The Court holds that claim (V)(B) satisfies neither the "performance" prong nor the "prejudice" prong of

the two-part test enunciated in *Strickland*. Petitioner fails to establish that even if he had asked counsel to seek a mistrial, one would have been granted. The testimony of the jurors regarding the outside contact proved there was no basis for a mistrial and the trial judge noted his satisfaction with the jurors' responses. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the outcome of the proceeding would have been different.

In a portion of claim (VI)(A), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to cross-examine Nate Rorls concerning continuances of Rorls' criminal trial in federal court. Petitioner claims that counsel should have cross-examined Rorls about the fact that any leniency he would receive from federal prosecutors depended on his testimony at petitioner's trial and should have cross-examined Rorls concerning the fact that Rorls' federal trial was continued and would not be held until after Rorls testified at petitioner's trial. Petitioner contends that this fact "contradicted Rorls' testimony that the capital murder case was a small factor in his anticipated federal deal."

The Court holds that this claim satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, establishes that counsel cross-examined Rorls about his discussions with the United States Attorney and the Drug Enforcement

Agency regarding his knowledge about petitioner's case and how that knowledge could benefit Rorls. Petitioner has not articulated how additional information concerning the details of Rorls' potential agreement with federal prosecutors would have affected his credibility. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In another portion of claim (VI)(A), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to effectively cross-examine Rorls about the existence and timing of alleged telephone calls between Rorls and petitioner. Petitioner alleges that Rorls gave conflicting statements and testimony as to when petitioner called him and confessed to the crimes and, under both versions of his account, Rorls claimed to have received the telephone call before the victims died.

The Court holds that this portion of claim (VI)(A) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The Commonwealth's evidence proved that petitioner saw Rorls the day after petitioner called Rorls; however, neither in his statement to police nor in his trial testimony did Rorls state what day he received the phone call or what day he met with petitioner. Rorls noted only that he received the phone call after the killings and that on the day after he received the phone call he spoke with petitioner in

person in Woodbridge, Virginia, and in Maryland. Furthermore, the information provided by Rorls corroborated the account given by Niesha Whitehead. Additionally, on direct appeal, petitioner conceded that he was present when the murders took place. Therefore, any discussion of the exact time of day petitioner made the phone call has little bearing on the truthfulness of Rorls' testimony that petitioner told Rorls he had "slumped" some people. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In another portion of claim (VI)(A), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to cross-examine Rorls about the conflict between his statement that petitioner told him that petitioner left the murder weapon at the victims' home and the Commonwealth's evidence, which showed that police recovered the weapon from a different home. Petitioner also alleges that he was denied the effective assistance of counsel because counsel failed to question Rorls about his failure to alert law enforcement about petitioner's confession for six months and then only after Rorls was arrested and charged with federal drug crimes.

The Court holds that this portion of claim (VI)(A) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including Rorls' statement to

police and the trial transcripts, demonstrates that there was no "glaring contradiction" because there were two guns involved in the killings. In both his statement to police and in his trial testimony, Rorls claimed that petitioner showed one of the guns, a 9-millimeter handgun, to Rorls. The trial transcript demonstrates that petitioner then took the gun to Robin Wilson to keep in his apartment where police later recovered it. When read in context, it is clear that, in his statement to police, Rorls was referring to the second gun, which Rorls believed, based upon his conversation with petitioner, had been left in the victims' house, but which actually had been found at a location near the house. The record demonstrates that the other gun used in the murders, a .38 caliber handgun, was found in Lynchburg near the victims' residence and near the area where articles of clothing worn by petitioner's co-defendant were found. Counsel's failure to cross-examine a witness concerning a contradiction that does not exist is not deficient performance. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In another portion of claim (VI)(A), petitioner alleges he was denied the effective assistance of counsel because counsel failed to investigate Rorls' statements. Petitioner bases this claim on Rorls' trial testimony that "Pego," petitioner's cousin, was present during petitioner's confession to Rorls in Woodbridge,

Virginia. Petitioner contends counsel erred because "counsel never asked [petitioner] who was present at the house, and never identified [Peyton] Carter before trial." Petitioner alleges that Peyton Carter is the cousin "Pego" who was present in Woodbridge. Carter submitted an affidavit wherein he stated that he would have testified that he was with petitioner the entire time petitioner was at the house in Woodbridge, Virginia, that petitioner and Rorls never had a private conversation in that house, and that Carter never heard petitioner mention the murders and never saw petitioner show anyone a gun.

The Court holds that this portion of claim (VI)(A) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including Carter's affidavit, establishes only that Carter did not hear or see petitioner confess to the crimes. Essentially, petitioner claims that counsel's assistance was ineffective because counsel failed to present the testimony of this witness who did not see the gun or hear the confession. As such, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In another portion of claim (VI)(A), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to present the testimony of Joe Lewis, who would have testified that he was present at the time and location of petitioner's

alleged in-person confession to Rorls and that he did not hear petitioner confess, nor did Rorls ever tell him that petitioner had confessed to the murders.

The Court holds that this portion of claim (VI)(A) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including Lewis' affidavit, establishes only that Lewis did not hear or see petitioner confess to the crimes and that Rorls did not relay petitioner's confession to him. Essentially, petitioner claims that counsel was ineffective for failing to present testimony of a witness who did not see or hear anything. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In another portion of claim (VI)(A), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to properly address testimony regarding Rhonda Robinson's pregnancy at the time of her death. The record establishes that the trial court ruled that it would allow testimony regarding Rhonda Robinson's pregnancy "if the witness can testify as to what the defendant told him about the appearance." Rorls testified on re-direct examination "that [Robinson] was pregnant." Petitioner claims that Rorls never testified about comments made by petitioner about Rhonda Robinson's appearance and that counsel should have objected or moved for a mistrial at that point of the

proceedings because the testimony was irrelevant, inflammatory, and prejudicial.

The Court holds that this portion of claim (VI)(A) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript and this Court's opinion on direct appeal, demonstrates that although Rhonda Robinson's pregnancy may not have been relevant before cross-examination, upon cross-examination it became relevant and admissible and was properly elicited on re-direct examination. Petitioner, therefore, cannot establish that an objection would have been successful. Furthermore, any chance that the information would have been improperly prejudicial was negated when counsel, on cross-examination, elicited testimony from Rorls that at least one other person knew about Rhonda Robinson's pregnancy. This testimony undermined the Commonwealth's contention that only Rhonda Robinson's killer knew about the pregnancy, that petitioner knew about the pregnancy, and that, therefore, the petitioner was Rhonda Robinson's killer. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (VI)(B), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to offer "affirmative evidence of

their theory" that there was "a viable alternate suspect," Tywan Turner.

The Court holds that this portion of claim (VI)(B) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates that counsel attempted to present evidence that Rhonda Robinson's sister, Angela Whitehead, had told Investigator Carson that Turner kept a 9-millimeter handgun in his car. Angela Whitehead surprised counsel by vehemently denying having made that statement to Carson. Counsel attempted to refresh Angela Whitehead's recollection and she maintained that she never saw a gun and never told anyone about a gun. Moreover, counsel presented evidence that Turner was the primary drug supplier to Anthony Robinson, a suspected drug dealer, that Anthony Robinson was under indictment for drug trafficking, and that Anthony Robinson had been released from custody shortly before his murder. Petitioner does not identify any additional evidence which counsel could have presented to demonstrate that Turner was "a viable alternate suspect." Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (VI)(C), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to call Patty Whitehead, Angela

Whitehead's sister and mother of two of Turner's children, to testify in furtherance of this "alternate suspect theory." Petitioner claims that Patty Whitehead would have testified that Turner dropped off the children at her home in Lynchburg around midnight on the night of the murders, placing him in the city and without the company of his children. She also would have testified, according to petitioner, that Turner supplied Anthony Robinson with drugs.

The Court holds that claim (VI)(C) fails to satisfy the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the transcript of Patty Whitehead's statement to law enforcement, establishes that she had "no idea" if Turner killed the victims. Moreover, her statement that Turner was in Lynchburg to drop off the children at her house is not evidence of his involvement in the crimes. Thus, petitioner has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (VI)(D), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to call Ann Marie Lewis as a defense witness. Petitioner contends that Lewis was concerned that Patty Whitehead influenced Niesha Whitehead's statement to police. Petitioner bases this claim on the notes from a police interview with Lewis. According to the notes, it appears that Lewis was present when Niesha Whitehead told the police that the men were masked. Later, however, Patty Whitehead told police

that Niesha had told her that one of the assailants was light-skinned, with braided hair and a tattoo of a dog on his arm.

The Court holds that claim (VI)(D) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. Petitioner does not proffer an affidavit from Lewis to establish that she would have testified as he contends. Furthermore, petitioner does not articulate how the two statements are inconsistent. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (VI)(E), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to confront Angela Whitehead with "important information contained in her recorded interview with Investigator Carson." The record, including the trial transcript, establishes that counsel subpoenaed Angela Whitehead to testify about statements she made immediately after the murders that tended to implicate Turner in the crimes. On direct examination, however, Angela Whitehead surprised defense counsel by denying having made any of the statements attributed to her.

The Court holds that claim (VI)(E) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, establishes that

counsel did confront Angela Whitehead with her statement to Investigator Carlson after she denied making the statement. After giving Angela Whitehead the opportunity to refresh her recollection by reviewing her prior statement to Carlson, the witness continued to insist that she had never seen the inside of Turner's car and that she had never seen Turner hold a weapon. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (VI)(F), petitioner alleges that he was denied the effective assistance of counsel because counsel failed to call Thomas Whitehead, Rhonda Robinson's brother, as a defense witness. Petitioner alleges that Thomas Whitehead made a statement to police and would have testified that Rhonda Robinson's daughter, Niesha, told him that she did not witness the actual shootings. Petitioner claims that Thomas Whitehead also would have testified that his sister, Patty Whitehead, had discussed the events with Niesha, which, petitioner contends, would have supported his theory that Patty Whitehead was attempting to deflect suspicion from Turner, the father of two of her children.

The Court holds that claim (VI)(F) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including transcripts and notes of Thomas Whitehead's statements to police, establishes that he

told police that Niesha, Rhonda Robinson's daughter, had told him and Patty Whitehead that she had seen her mother get shot. Petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (VI)(G), petitioner alleges he was denied the effective assistance of counsel because counsel failed to call Investigator Gearhardt in order to demonstrate to jurors that police ignored Turner as a possible suspect in the murders despite their knowledge that Turner was in Lynchburg on the night of the murders, that he had a motive to murder Anthony Robinson, that Turner owned guns, and that Turner matched the general physical description given by Niesha Whitehead, the sole eyewitness to the murders. Petitioner claims that Turner, by his own admission to police, knew that Anthony Robinson had been incarcerated the weekend before his death and that Turner had seen Anthony Robinson within days of his murder.

The Court holds that claim (VI)(G) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record establishes that counsel presented evidence that Turner was concerned that Anthony Robinson would implicate him in drug trafficking and that Turner had guns. The jury could have inferred that Turner was involved in the killings. Further, the record establishes that petitioner admitted he was

present at the scene at the time of the murders and he was identified as the shooter by the tattoo on his arm. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (VII)(A), petitioner alleges that the Commonwealth made several misstatements of fact during its closing argument at the conclusion of the guilt phase of petitioner's trial. First, petitioner claims that the Commonwealth improperly referred to petitioner as "Mr. No Name," whom Niesha Whitehead identified as the person who shot her mother. Second, petitioner claims that the Commonwealth improperly argued in closing that Niesha's testimony proved "that the two men had guns." Third, petitioner claims that the Commonwealth improperly argued in closing that the results at each locus in petitioner's DNA profile matched the results at the corresponding locus on the sample taken from the murder weapon.

The Court holds that claim (VII)(A) is procedurally defaulted because these non-jurisdictional issues could have been raised at trial and on direct appeal and, thus, are not cognizable in a petition for a writ of habeas corpus. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

In a portion of claim (VII)(B), petitioner claims that he was denied the effective assistance of counsel

because counsel failed to object to the Commonwealth's misstatement that petitioner was "Mr. No Name." Petitioner contends that the prosecutor's reference to petitioner as "Mr. No Name" is a misstatement because Niesha had identified "Mr. No Name," as a black-clad black male and the Commonwealth had introduced into evidence petitioner's black sweatshirt with white stripes on the arms and Niesha had described "Mr. No Name's Friend" as wearing black with white stripes.

The Court holds that this portion of claim (VII)(B) satisfies neither the "performance" nor the "prejudice" prongs of the two-part test in *Strickland*. The record, including the trial transcript, establishes that Niesha also testified that "Mr. No-Name" bore a tattoo of a dog on his arm, and that petitioner bore a tattoo of a dog on his arm. On direct appeal, petitioner did not deny that he was present at the shootings and the record demonstrates that he was the only criminal actor bearing a tattoo on his arm. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (VII)(B), petitioner claims that he was denied the effective assistance of counsel because counsel failed to object to the Commonwealth's misstatement that Niesha Whitehead's testimony proved that both assailants had guns. The Court holds that this portion of claim (VII)(B) satisfies

neither the "performance" nor the "prejudice" prong of the two-part test in *Strickland*. The record, including the trial transcript, establishes that counsel elicited from Niesha Whitehead on cross-examination that only one of the men had a gun. Niesha positively identified the man who shot her mother as the man with a tattoo on his arm. In addition, Niesha's mother was shot three times with a 9-millimeter handgun, the gun which petitioner is identified as having possessed. Anthony Robinson, however, was shot eight times: seven times with the 9-millimeter handgun and once with a .38 caliber handgun. No evidence was presented that petitioner ever possessed the .38 caliber weapon. Consequently, objecting to the Commonwealth's argument that the second assailant also had a gun would have been without effect. Petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (VII)(B), petitioner claims that he was denied the effective assistance of counsel because counsel failed to object to the Commonwealth's misstatement that petitioner's DNA matched the DNA recovered from the murder weapon at the TPOX, Penta D, and the CSF1PO loci because the results of the DNA testing were inconclusive for both the petitioner and the gun. Petitioner contends that the prosecutor misstated the record because, in fact, no result was obtained at the TPOX locus for either

the gun or the petitioner and because an inconclusive result does not constitute a "match."

The Court holds that this portion of claim (VII)(B) satisfies neither the "performance" nor the "prejudice" prongs of the two-part test in *Strickland*. The record, including the trial transcript, demonstrates that there was overwhelming evidence of petitioner's DNA on the weapon, and that the evidence introduced at trial established that the likelihood of another person being the contributor of the DNA on the weapon was greater than one in six billion. Any error in the prosecutor's argument concerning whether there were inconclusive results, as opposed to no results at the TPOX locus, would not have been prejudicial in light of the conclusions to which the experts testified concerning the DNA match and the trial court's instruction that closing argument is not evidence. As to the prosecutor's argument that the other loci contained inconclusive results for both the gun and the petitioner, the evidence adduced at trial supports the prosecutor's statements. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

With respect to petitioner's claim that he was denied the effective assistance of counsel because counsel failed to object to the Commonwealth's argument that an "inconclusive" finding on the TPOX locus from both petitioner's DNA sample and the sample from the murder weapon constituted a positive

DNA match, the Court holds that this portion of claim (VII)(B) satisfies neither the "performance" nor the "prejudice" prong of the two-part test in *Strickland*. The record, including the trial transcript and the testimony of the Commonwealth's DNA expert, establishes that there was overwhelming evidence of petitioner's DNA on the weapon, even if petitioner's DNA was not on the specific locus that was mentioned during closing. Petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claims (VIII)(A) and (VIII)(B), petitioner alleges that his execution is barred by *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), because he was diagnosed with mental retardation at age sixteen and allegedly meets the statutory definition for mental retardation as prescribed in Code § 19.2-264.3:1.1. In support of this claim, petitioner relies on a cover page from a Fairfax County Public Schools Special Education Eligibility Form that indicates that petitioner was eligible to receive special education services after school officials determined that he was disabled due to mild mental retardation. Petitioner additionally submits an affidavit indicating that the test scores and data relied upon to reach this determination are unavailable.

The Court holds that claims (VIII)(A) and (VIII)(B) are not cognizable in a petition for a writ of

habeas corpus, as these non jurisdictional issues could have been raised at trial and on direct appeal. *Slayton*, 215 Va. at 29, 205 S.E.2d at 682.

In claim (VIII)(C), petitioner alleges he was denied the effective assistance of counsel because counsel unreasonably failed to present evidence of petitioner's mental retardation, including petitioner's school record diagnosing his mental defects and evidence of the "Flynn Effect," a multiplier that petitioner asserts must be accounted for in calculating a person's true intelligence quotient (IQ) score.

The Court holds that claim (VIII)(C) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the evidence presented at trial and the documents upon which petitioner now relies, demonstrates that petitioner was administered three standardized tests for measuring intellectual functioning. Petitioner achieved full-scale scores of 77, 76, and 73 on three administrations of the Wechsler Intelligence Scale for Children-Revised. While petitioner offered evidence that he was once described as "mildly mentally retarded" for the purposes of special education eligibility, the definitions of mental retardation provided by petitioner demonstrate that for special-education eligibility, a candidate may, nonetheless, have an IQ score above 70. Furthermore, petitioner offers no objective data in support of his claim of mental retardation. The legislature has defined mental retardation as:

> [A] disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

Code § 19.2-264.3:1.1(A).

This Court has previously held that the maximum score for a classification of mental retardation is an I.Q. score of 70. *See Johnson v. Commonwealth*, 267 Va. 53, 75, 591 S.E.2d 47, 59 (2004), *vacated on other grounds*, 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 270 (2005). Petitioner provides no documentation that he was diagnosed as being mentally retarded before the age of 18 in accordance with the legal definition of mental retardation established by the legislature. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (VIII)(D), petitioner alleges he was denied the effective assistance of counsel because counsel failed to present evidence about petitioner's subaverage intellectual functioning. Petitioner

contends that there was abundant evidence of his low functioning and its impact on his life.

The Court holds that claim (VIII)(D) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript and the exhibits admitted at trial, demonstrates that counsel moved into evidence copies of four different psychological evaluations made of petitioner in 1987, 1990, 1994 and 1995. These reports included the following findings: petitioner "is a youngster of mentally deficient to average intelligence" with "functional deficits . . . evidenced in short and long term auditory memory, visual memory, visual motor integration, visual sequencing, and perception and integration of part-whole relationships;" petitioner had "extreme problems maintaining attention and effort;" "declining" verbal scores over the years; and "many emotional concerns resulting from his abandonment and rejection from various family members." Petitioner does not identify the substance of any additional evidence he contends counsel should have presented and does not explain how such evidence would not have been cumulative. Furthermore, petitioner does not allege how the presentation of this evidence would have affected the proceedings. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (IX), petitioner alleges he was denied the effective assistance of counsel because counsel failed to investigate and present available mitigation evidence. Petitioner alleges that counsel failed to investigate his immediate family's criminal activity during his formative years and that counsel failed to interview or present for the jury's consideration petitioner's schoolteachers, psychologist, counselors and social workers, who observed the impact petitioner's exposure to his family environment had on him. Petitioner alleges that counsel failed to interview other children in petitioner's family, who also were exposed to the adults' criminal activity, and failed to review the court files from the prosecutions of petitioner's mother and grandmother. Petitioner contends it was unreasonable for counsel to present psychological reports and "hope" the jury would read them.

The Court holds that claim (IX) satisfies neither the "performance" prong nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the trial transcript, demonstrates that counsel presented the testimony of petitioner's mother, Connie Winston, that she drank alcohol and used PCP, marijuana and cocaine nearly every day while she was pregnant with petitioner. Petitioner's grandmother, Mary Berrios, testified that petitioner, while he was a child in Berrios' care, accompanied Berrios on various shoplifting capers and observed his grandmother stealing merchandise. Counsel moved into evidence copies of four different psychological

evaluations made of petitioner in 1987, 1990, 1994 and 1995. These reports included the following findings: petitioner "is a youngster of mentally deficient to average intelligence" with "functional deficits . . . evidenced in short and long term auditory memory, visual memory, visual motor integration, visual sequencing, and perception and integration of part-whole relationships;" petitioner had "extreme problems maintaining attention and effort;" "declining" verbal scores over the years; and "many emotional concerns resulting from his abandonment and rejection from various family members."

Petitioner does not articulate how the evidence he claims counsel failed to present would not have been cumulative, given the evidence that counsel did present in mitigation. Furthermore, petitioner does not allege that the jury disregarded the trial court's instruction to consider the evidence in aggravation and in mitigation and to review the additional exhibits. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In a portion of claim (X), petitioner alleges that the Commonwealth made improper statements during its closing argument in the sentencing phase of petitioner's trial. First, petitioner claims that the Commonwealth violated his right to due process by referring to petitioner as a "pitbull." Second, petitioner claims that the Commonwealth's request of the jury

for "justice for our community" was improper in that it called for the jury to sentence petitioner on behalf of the community rather than on the law and the facts presented.

The Court holds that this portion of claim (X) is procedurally defaulted because these non-jurisdictional issues could have been raised at trial and on direct appeal and, thus, are not cognizable in a petition for a writ of habeas corpus. *Slayton,* 215 Va. at 29, 205 S.E.2d at 682.

In another portion of claim (X), petitioner alleges he was denied the effective assistance of counsel because counsel failed to object to the Commonwealth's improper statements during the closing argument of the sentencing phase of petitioner's trial, as set forth in the first portion of claim (X).

The Court holds that this portion of claim (X) fails to satisfy the "prejudice" prong of the two-part test enunciated in *Strickland.* The record, including the trial transcript, demonstrates that the prosecutor's statement during closing regarding "justice for the community," was not improper. This Court has previously held that "[w]hile considerations of deterrence should not be the basis for a finding of guilt of the offense, such considerations may be argued in connection with the punishment to be assessed for the crime." *Wilkins v. Commonwealth,* 253 Va. 156, 157, 482 S.E.2d 837, 838 (1997) (citing *Payne v. Commonwealth,* 233 Va. 460, 468, 357 S.E.2d 500, 505, 3 Va. Law Rep. 2720, *cert. denied,* 484 U.S.

933, 108 S. Ct. 308, 98 L. Ed. 2d 267 (1987)). Furthermore, not every improper argument amounts to a denial of due process.

> The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.* at 642.

Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). *See also Bennett v. Angelone,* 92 F.3d 1336, 1346-47 (4th Cir. 1996) (religiously loaded closing argument, while "highly improper and deserve[d] condemnation" did not render death sentence constitutionally infirm). Petitioner has not demonstrated that in the context of the trial, considering all of the evidence and the totality of the arguments, the prosecutor's reference to petitioner as a "pitbull" rendered the death penalty constitutionally infirm. Thus, petitioner has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different.

In claim (XI), petitioner alleges that the claims concerning petitioner's constitutional right to effective assistance of counsel, when considered cumulatively, demonstrate that "trial counsels' performance and the

resulting prejudice deprived Winston of constitutionally guaranteed effective assistance of counsel, and requires that his convictions and/or sentences be vacated."

The Court holds that petitioner's claim (XI) is without merit. As addressed previously, petitioner has failed to demonstrate prejudice as a result of counsel's alleged errors. "Having rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." *Lenz v. Warden of the Sussex I State Prison*, 267 Va. 318, 340, 593 S.E.2d 292, 305, *cert. denied*, 542 U.S. 953, 124 S. Ct. 2933, 159 L. Ed. 2d 836 (2004).

Upon consideration thereof, petitioner's "motion for leave to depose the department of forensic science," "motion for funds to hire a psychologist or psychiatrist," "motions for appointment of a DNA expert and discovery of electronic data," and "motion for discovery" are denied.

Accordingly, for the reasons stated, the petition is dismissed.

FILED: February 23, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2
(7:07-cv-00364-sgw-mfu)

LEON J. WINSTON,

Petitioner-Appellant

v.

LORETTA K. KELLY, Warden,
Sussex I State Prison,

Respondent-Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Michael, Judge Gregory and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

TITLE 19.2. CRIMINAL PROCEDURE
CHAPTER 15. TRIAL AND ITS INCIDENTS
ARTICLE 4.1. TRIAL OF CAPITAL CASES

Va. Code Ann. § 19.2-264.3:1.1 (2003)

§ 19.2-264.3:1.1. Capital cases; determination of mental retardation

A. As used in this section and § 19.2-264.3:1.2, the following definition applies:

"*Mentally retarded*" means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

B. Assessments of mental retardation under this section and § 19.2-264.3:1.2 shall conform to the following requirements:

1. Assessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. Testing of intellectual functioning shall be

carried out in conformity with accepted professional practice, and whenever indicated, the assessment shall include information from multiple sources. The Commissioner of Mental Health, Mental Retardation and Substance Abuse Services shall maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing.

2. Assessment of adaptive behavior shall be based on multiple sources of information, including clinical interview, psychological testing and educational, correctional and vocational records. The assessment shall include at least one standardized measure generally accepted by the field of psychological testing for assessing adaptive behavior and appropriate for administration to the particular defendant being assessed, unless not feasible. In reaching a clinical judgment regarding whether the defendant exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate in light of the defendant's history and characteristics and the context of the assessment.

3. Assessment of developmental origin shall be based on multiple sources of information generally accepted by the field of psychological testing and appropriate for the particular defendant being assessed, including, whenever available, educational, social service, medical records, prior disability assessments, parental or caregiver reports, and other collateral data, recognizing that valid clinical

assessment conducted during the defendant's childhood may not have conformed to current practice standards.

C. In any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4.

In any case in which the offense may be punishable by death and is tried before a judge, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the judge as part of the sentencing proceeding required by § 19.2-264.4.

The defendant shall bear the burden of proving that he is mentally retarded by a preponderance of the evidence.

* * *

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

28 USCS § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

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